SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 96

RESERVE LIFE INSURANCE COMPANY,
APPELLANT,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER
OF OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1]

BEFORE THE TAX COMMISSIONER OF OHIO

1 THIS RETURN TO BE FILED WITH THE DEPARTMENT OF TAXATION, ROOM 1030, OHIO DEPARTMENTS BUILDING, COLUMBUS (15) OHIO, BETWEEN FEBRUARY 15 AND APRIL 30, 1960

THE LAW IMPOSES A FIFTY PER CENT PENALTY FOR FAILURE TO FILE A RETURN. IN ADDITION THE LAW ALSO IMPOSES A CHARGE OF ONE-HALF OF ONE PER CENT PER MONTH WHEN A RETURN IS DELINQUENT OR PROPERTY HAS BEEN OMITTED.

Return No. R-191

~~1963-64 Ex. Session Law 60 Ref. 57-16 - 57-19 - 57-20~~

STATE OF OHIO

Title as — 1960

PERSONAL PROPERTY TAX RETURN

OF

R&R

NAME OF CORPORATION RESERVE LIFE INSURANCE CO.

ADDRESS OF PRINCIPAL ACCOUNTING OFFICE 4C3 S. AKARD ST.

CITY AND STATE DALLAS 1, TEXAS

Name of former owner if property was listed by another in 1959.

ASSESSED

DATE INCORPORATED OR QUALIFIED IN OHIO _____ INCORPORATED IN STATE OF _____

OHIO CHARTER NUMBER _____

EXTENSION TO _____ 1960. NUMBER _____

CONSOLIDATED CORPORATION RETURN . . . . . ☐

Stanley J. Bowers
DEPARTMENT OF TAXATION (DO NOT WRITE BELOW)

Check No.	V	Office Audit	11/16
Typed Sheets Checked	163 11/16	Detailed Posting	
Pre-Assessment Audit	2/11/16	To Be Field Audited	
Detailed Checked	1/16	Field Audit Completed	
Computation Checked		Acceptable as Corrected	
		Acceptable as Is	

TAX FORM No. 66. Prescribed by Stanley J. Bowers, Tax Commissioner

TRANSCRIPT
TAX COMMISSIONER

RESERVE LIFE INSURANCE COMPANY — OHIO — YEAR 1948

SCHEDULE 4

FURNITURE AND FIXTURES—MACHINERY & EQUIPMENT — SUPPLIES NOT USED IN MANUFACTURING.

List in this schedule personal property such as office furniture and fixtures, machinery and equipment not listable at 50% of depreciated book value. Inventories of other than Manufacturers or Merchants. Supplies not used in manufacturing. Hotel and Restaurant Equipment, Amusement Equipment, Watercraft, Electrical Equipment used for generating and distributing electricity to others, etc. If value of equipment below is based on "true value" computation, attach detail.

List separately property used in each Taxing District.

County	Taxing District	Type of Business	Description of Property Items	Depreciated Book Value	Description of Property Items	Depreciated Book Value	Description of Property Items	Depreciated Book Value	Total Depreciated Book Value (Dollars Only)	Listed Value 70% of Total Depreciated Book Value (Dollars only 50 of)
Summit		Insurance	Furniture & Fixtures							
Stark		"	"						787	537
Hamilton		"	"						889	888
Butler		"	"						96 788	38 787
Scioto		"	"						889	888
Cuyahoga		"	"						889	888
Franklin		"	"						787	537
Muskingum		"	"						787	537
Montgomery		"	"						889	888
Lucas		"	"						787	537
Allen		"	"						787	537
Erie		"	"						889	888
Mahoning		"	"						889	888
Trumbull		"	"						787	537
Portage		"	"						889	888
Clark		"	"							
Richland		"	"							
Jefferson		"	"							
Lake		"	"							
Ashtabular		"	"							
Licking		"	"							
Lorain		"	"							
Seneca		"	"							
Fairfield		"	"							
Lawrence		"	"							
Marion		"	"							
									33 407	49 388

TRANSCRIPT TAX COMMISSIONER

10

Form No. 96

[fol. 2]

RESERVE LIFE INSURANCE COMPANY

OHIO

YEAR 1938

FURNITURE AND FIXTURES—MACHINERY & EQUIPMENT — SUPPLIES NOT USED IN MANUFACTURING.

List in this schedule personal property such as office furniture and fixtures, machinery and equipment not listable at 50% of depreciated book value, Inventories of other than Manufacturers or Merchants, Supplies not used in manufacturing, Hotel and Restaurant Equipment, Amusement Equipment, Watercraft, Electrical Equipment used for generating and distributing electricity to others, etc. If value of equipment below is based on "true value" computation, attach detail.

List separately property used in each Taxing District.

County	Taxing District	Type of Business	Description of Property Items	Depreciated Book Value	Description of Property Items	Depreciated Book Value	Description of Property Items	Depreciated Book Value	Total Depreciated Book Value (Dollars Only)	Equal Value 70% of Total Depreciated Book Value (Entire value of ...)
Medina		Insurance	Furniture & Fixtures							
Wayne		"	"							
Clermont		"	"							
Highland		"	"							
Fayette		"	"							
Darke		"	"							
Miami		"	"							
Shelby		"	"							
Ashland		"	"							
Sandusky										
Knox										
Huron										
Wood										
Defiance										
Hancock										
Van Wert										
Guernsey										
Muskingum										
Coshocton										
Columbiana										
Belmont										
Tuscarawas										
Knox										
Totals									100	

RECEIVED
TAX COMMISSIONER
TRANSCRIPT
21

SCHEDULE 4

Form No. 903

[fol. 3]

3

[fol. 4]

BEFORE THE BOARD OF TAX APPEALS

DEPARTMENT OF TAXATION, STATE OF OHIO

No. 8885

In the matter of the application of RESERVE LIFE INSURANCE COMPANY, a foreign insurance company, Dallas, Texas, for review and redetermination of increased personal property tax assessments for the years 1948 through 1960, inclusive.

FINAL ORDER—December 19, 1961

This proceeding, being the application of Reserve Life Insurance Company, a foreign insurance company, Dallas, Texas, for review and redetermination of increased personal property tax assessments for the years 1948 through 1960, inclusive, after being duly heard, came on to be reconsidered.

It is the finding of the Tax Commissioner that under date of December 1, 1961, a journal entry was issued respecting this application No. 8885 making certain findings with respect to the assessment of additional charges, pursuant to the provisions of Section 5711.27, Revised Code, for the failure to file returns within the time prescribed by law, for the years 1948 to 1957, inclusive. It is the finding of the Tax Commissioner that the additional charges of 17½% for the years 1948 to 1957, inclusive, were erroneously assessed and, therefore, said entry which failed to reflect same was incorrect and is hereby set aside and held for naught.

Upon reconsideration the Tax Commissioner finds that as a result of audit, increased personal property tax assessments were made against the property of the applicant which property was determined by the Department to be taxable under Schedule 4 of the returns for each of the years in question. In addition, a 5% penalty, reduced from 50%, plus additional charges of 17½% for the years 1948

through 1957, inclusive, 14% for the year 1958, 8% for the year 1959 and 2% for the year 1960 were added to the assessments. The applicant filed an application for review and redetermination pursuant to the provisions of Section 5711.31, Revised Code, objecting to the assessments as made and contending that: (1) the taxing and insurance statutes of the State of Ohio should be read together so as to be consistent, and if this is done the personal property of Reserve Life Insurance Company in the State of Ohio has a value of zero; (2) the personal property tax, as applied to foreign insurance companies, is unconstitutional under Article I, Section 2 of the Ohio Constitution, as the tax is [fol. 5] not levied on domestic insurance companies; and, (3) the personal property tax, as applied to foreign insurance companies, is unconstitutional under the equal protection clause of Section 1 of the Fourteenth Amendment to the United States Constitution, as the tax is not levied on domestic insurance companies.

Upon consideration of the information submitted at and subsequent to the hearings, Section 5701.03, 5709.01, 5711.01, 5711.03, 5711.18 and 5711.22, Revised Code, Department of Taxation Rule 202, and all other available information, the Tax Commissioner finds applicant's first contention is not well taken; that the property in question is subject to taxation in Ohio and to be returned by the applicant and that the true value of the property in question was as determined and assessed for each of the years in question.

Being further advised in the premises, the Tax Commissioner finds that, he, being an administrative official and a creature of statute, has neither jurisdiction nor authority for finding the assessments in question as being violative of either the Ohio or United States Constitutions. It is the further finding of the Tax Commissioner that additional charges of 17½% were erroneously assessed for the years 1948 to 1957, inclusive, and are hereby set aside. In all other respects, including the assessment of additional charges for the years 1958 to 1960, inclusive, the Tax Commissioner finds the assessment here under review to be proper and correct.

It is, therefore, the final order of the Tax Commissioner that corrected assessment certificates be issued for the years 1948 to 1957, inclusive, to reflect the findings made in this journal entry and that the assessments for the years 1958 to 1960, inclusive, be as determined and assessed.

Department of Taxation, Stanley J. Bowers, Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation this day taken by the Tax Commissioner with respect to the above matter.

Stanley J. Bowers, Tax Commissioner.

[fol. 6]

BEFORE THE BOARD OF TAX APPEALS

DEPARTMENT OF TAXATION, STATE OF OHIO

No. 9170

In the matter of the application of RESERVE LIFE INSURANCE COMPANY, a foreign insurance company, Dallas, Texas, for review and redetermination of increased personal property tax assessment for the year 1961.

FINAL ORDER—December 1, 1961

This proceeding, being the application of Reserve Life Insurance Company, a foreign insurance company, Dallas, Texas, for review and redetermination of an increased personal property tax assessment for the year 1961, after being duly heard, came on to be considered.

Upon audit, an increased personal property tax assessment was made against property of the applicant, which property was determined by the Department to be taxable under Schedule 4 of the return for the year in question. The applicant filed an application for review and redetermination pursuant to the provisions of Section 5711.31,

Revised Code, objecting to the assessments as made and contending that: (1) the taxing and insurance statutes of the State of Ohio should be read together so as to be consistent, and if this is done the personal property of Reserve Life Insurance Company in the State of Ohio has a value of zero; (2) the personal property tax, as applied to foreign insurance companies, is unconstitutional under Article I, Section 2 of the Ohio Constitution, as the tax is not levied on domestic insurance companies; and, (3) the personal property tax, as applied to foreign insurance companies, is unconstitutional under the equal protection clause of Section 1 of the Fourteenth Amendment to the United States Constitution, as the tax is not levied on domestic insurance companies.

Upon consideration of the information submitted at and subsequent to the hearing, Sections 5701.03, 5709.01, 5711.01, 5711.03, 5711.18 and 5711.22, Revised Code, Department of Taxation Rule 202, and all other available information, the Tax Commissioner finds applicant's first contention is not well taken; that the property in question is subject to taxation in Ohio and to be returned by the applicant; and that the true value of the property in question was as determined and assessed for the year in question.

Being further advised in the premises, the Tax Commissioner finds that, he, being an administrative official and a [fol. 7] creature of statute, has neither jurisdiction nor authority for finding the assessment in question as being violative of either the Ohio or United States Constitutions. Accordingly, the Tax Commissioner finds no error in the assessment here under review.

Finding no error in the assessment here under review, it is the finding of the Tax Commissioner that this assessment be, and the same hereby is, affirmed.

Department of Taxation, Stanley J. Bowers, Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation this day

taken by the Tax Commissioner with respect to the above matter.

Stanley J. Bowers, Tax Commissioner.

[fol. 8]

BEFORE THE BOARD OF TAX APPEALS

DEPARTMENT OF TAXATION, STATE OF OHIO

No. 48267

RESERVE LIFE INSURANCE COMPANY, 403 South Akard Street, Dallas 2, Texas,

v.

STANLEY J. BOWERS, Tax Commissioner, State of Ohio, Ohio Departments of State Building, Columbus, Ohio.

STIPULATION OF FACTS—Offered April 3, 1962

It is hereby stipulated that, for the purposes of this case, the following statements may be accepted as facts; provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.

1. Reserve Life Insurance Company (hereinafter sometimes referred to as "Reserve") is a legal reserve life insurance company, organized and existing under the laws of the State of Texas. It is a stock company and is owned by its stockholders.

2. Reserve does business in the District of Columbia and all states of the United States except Connecticut, Massachusetts, Michigan, New Jersey, New York and Rhode Island. It first began doing business in Ohio in the fall of 1947, and has continued ever since.

3. Since it began doing business in the State of Ohio, Reserve has annually filed a Statement of Condition as of December 31 of each year, in accordance with Section [fol. 9] 3909.06 of the Revised Code of Ohio, and has com-

plied with all regulations of the Department of Insurance of the State of Ohio. It has paid its franchise tax annually.

4. Reserve has never paid a personal property tax to the State of Ohio. No request was directed to Reserve to pay such a tax until 1959. Reserve promptly raised the question of the applicability and constitutionality of the personal property tax law as applied to it, but supplied the Department of Taxation with valuation of its furniture and fixtures owned by it in the State of Ohio on January 1 for the years 1948 through 1960.

5. If the final determination of this controversy is that the personal property tax on furniture and fixtures is due from Reserve to the State of Ohio, the parties agree that the valuations supplied by Reserve to the State of Ohio for the years 1948 through 1960, by counties, are correct. In this event, the matter shall be referred to the Tax Commissioner for a proper breakdown of the property by taxing districts, reserving to Reserve full rights of appeal as to the property assigned by the Tax Commissioner to each taxing district.

Dinsmore, Shohl, Barrett, Coates & Deupree, Attorneys for Reserve Life Insurance Company, By Harris K. Weston.

Mark McElroy, Attorney General—State of Ohio, Attorney for Stanley J. Bowers, Tax Commissioner—State of Ohio, By John J. Lokos, Assistant Attorney General.

[fol. 10]

BEFORE THE BOARD OF TAX APPEALS

DEPARTMENT OF TAXATION, STATE OF OHIO

No. 48268

RESERVE LIFE INSURANCE COMPANY, 403 South Akard Street, Dallas 2, Texas,

v.

STANLEY J. BOWERS, Tax Commissioner, State of Ohio, Ohio Departments of State Building, Columbus, Ohio.

STIPULATION OF FACTS—Offered April 3, 1962

It is hereby stipulated that, for the purposes of this case, the following statements may be accepted as facts; provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.

* * * * * * *

[fol. 11] 4. Reserve has never paid a personal property tax to the State of Ohio. No request was directed to Reserve to pay such a tax until 1959. Reserve promptly raised the question of the applicability and constitutionality of the personal property tax law as applied to it, but supplied the Department of Taxation with valuation of its furniture and fixtures owned by it in the State of Ohio on January 1 for the year 1961.

5. If the final determination of this controversy is that the personal property tax on furniture and fixtures is due from Reserve to the State of Ohio, the parties agree that the valuations supplied by Reserve to the State of Ohio for the year 1961, by counties, are correct. In this event, the matter shall be referred to the Tax Commissioner for a proper breakdown of the property by taxing districts, re-

serving to Reserve full rights of appeal as to the property assigned by the Tax Commissioner to each taxing district.

Dinsmore, Shohl, Barrett, Coates & Deupree, Attorneys for Reserve Life Insurance Company, By Harris K. Weston.

Mark McElroy, Attorney General, State of Ohio, Attorney for Stanley J. Bowers, Tax Commissioner—State of Ohio, By John J. Lokos, Assistant Attorney General.

[fol. 12]

BEFORE THE BOARD OF TAX APPEALS

DEPARTMENT OF TAXATION

STATE OF OHIO

Case Nos. 48267 and 48268
(Personal Property)

RESERVE LIFE INSURANCE COMPANY, 403 South Akard Street, Dallas 2, Texas, Appellant,

vs.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

ENTRY—July 17, 1962

Appearances:

For the Appellant—Harris K. Weston, c/o Dinsmore, Shohl, Barrett, Coates and Deupree, 12th Floor, Union Central Building, Cincinnati 2, Ohio.

For the Appellee—Mark McElroy, Ohio Attorney General, by John J. Lokos, Assistant.

This cause and matter came on to be considered by the Board of Tax Appeals upon two notices of appeal filed

herein under date of January 2, 1962, by the appellant above-named from two final orders of the Tax Commissioner dated December 1, 1961 (Case No. 48268) and December 19, 1961 (Case No. 48267), in and by which final orders that official confirmed an increased tangible personal property tax assessment theretofore made by him against the appellant corporation for the years 1948 through 1960, inclusive (Case No. 48267) and the year 1961 (Case No. 48268).

[fol. 13] The matters were consolidated for hearing and, as thus consolidated, the matter was submitted to the Board of Tax Appeals upon the notices of appeal, the statutory transcripts supplied by the Tax Commissioner, the stipulations of fact agreed to by counsel for the parties, the statements of counsel made at the hearing before the Board of Tax Appeals in Columbus, Ohio, on April 3, 1962, and the briefs filed by counsel.

The stipulation of fact in Case No. 48267 reads as follows:

> "It is hereby stipulated that, for the purposes of this case, the following statements may be accepted as facts; provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.
>
> "1. Reserve Life Insurance Company (hereinafter sometimes referred to as 'Reserve') is a legal reserve life insurance company, organized and existing under the laws of the State of Texas. It is a stock company and is owned by its stockholders.
>
> "2. Reserve does business in the District of Columbia and all states of the United States except Connecticut, Massachusetts, Michigan, New Jersey, New York and Rhode Island. It first began doing business in Ohio in the fall of 1947, and has continued ever since.
>
> "3. Since it began doing business in the State of Ohio, Reserve has annually filed a Statement of Condition as of December 31 of each year, in accordance with Section 3909.06 of the Revised Code of Ohio, and has complied with all regulations of the Department of

Insurance of the State of Ohio. It has paid its franchise tax annually.

"4. Reserve has never paid a personal property tax to the State of Ohio. No request was directed to Reserve to pay such a tax until 1959. Reserve promptly raised the question of the applicability and constitutionality of the personal property tax law as applied to it, but supplied the Department of Taxation with valuation of its furniture and fixtures owned by it in the State of Ohio on January 1 for the years 1948 through 1960.

[fol. 14] "5. If the final determination of this controversy is that the personal property tax on furniture and fixtures is due from Reserve to the State of Ohio, the parties agree that the valuations supplied by Reserve to the State of Ohio for the years 1948 through 1960, by counties, are correct. In this event, the matter shall be referred to the Tax Commissioner for a proper breakdown of the property by taxing districts, reserving to Reserve full rights of appeal as to the property assigned by the Tax Commissioner to each taxing district."

The stipulation in Case No. 48268 is identical with that in Case No. 48267, with the exception that in paragraphs 4 and 5 the words "for the year 1961" appear in place of the words "for the years 1948 through 1960."

As noted in the stipulation of fact the appellant is a "foreign life insurance company" and, as such, is required to file annually with the Ohio Superintendent of Insurance a statement of its condition and affairs (Revised Code Sections 3907.19 and 3909.06). For the years here in question the appellant filed the required statement with the Ohio Superintendent of Insurance and in each statement there was no monetary value placed upon appellant's tangible personal property (furniture and equipment) located in Ohio and used by the appellant in its Ohio business activities.

The appellant filed no Ohio personal property tax returns for the years in question and the Tax Commissioner,

being of the opinion that tangible personal property located in Ohio and used by a foreign insurance company in its business in Ohio is subject to ad valorem property tax in Ohio, proceeded to issue the assessments here in issue and to subject to Ohio taxation the furniture and equipment of appellant located in Ohio at a value supplied [fol. 15] to the Tax Commissioner, at his request, by the appellant, and which values the Tax Commissioner accepted as being the "true value in money" thereof.

The issues raised in this matter may be stated as follows:

(1) Is the appellant an Ohio "taxpayer" within the definition of that word as found in Revised Code Section 5711.01 (B)?

(2) Does the Tax Commissioner have authority to revalue the furniture and equipment of a foreign insurance company at its true value in money for Ohio personal property tax purposes and to thereby disregard a zero valuation placed upon said furniture and equipment by the insurance company in a statement filed with the Ohio Superintendent of Insurance, in which statement it was required that said furniture and equipment be assigned a zero valuation?

(3) Is such a tax levied against personal property of a "foreign insurance company" constitutional under the Constitution of the State of Ohio and the Constitution of the United States of America when "domestic insurance companies" are excluded from the definition of "taxpayer" under the provisions of Revised Code Section 5711.01 (B), and when the tangible personal property of a "domestic insurance company" is excluded from Ohio taxation by virtue of the provisions of Revised Code Section 5725.25?

The Board of Tax Appeals has jurisdiction and authority to decide the first two questions presented, but, being a quasi-judicial body and a creature of the statute, it is limited to the powers with which it is thereby invested and it has no jurisdiction to declare a statute unconstitutional.

Therefore, no opinion will be herein expressed with respect to the merits of appellant's claim as noted in question 3.

The pertinent portion of Revised Code Section 5711.01 reads as follows:

[fol. 16] "As used in sections 5711.01 to 5711.41, inclusive, of the Revised Code:

"(A) • • •

"(B) 'Taxpayer' means any owner of taxable property and includes every person residing in, or incorporated or organized by or under the laws of this state, or doing business in this state, or owning or having a beneficial interest in taxable personal property in this state and every fiduciary required by sections 5711.01 to 5711.41, inclusive, of the Revised Code to make a return for or on behalf of another. The tax commisssioner may by regulations define and designate the taxpayer, as to any taxable property which would not otherwise be required by this section to be returned; and any such regulation shall be considered supplementary to the enumeration of kinds of taxpayers following:

"(1) • • •

"(2) • • •

"(3) • • •

" 'Taxpayer' excludes all individuals, partnerships, corporations, associations, and joint-stock companies, their executors, administrators, and receivers who are defined in Title LVII of the Revised Code as financial institutions, dealers in intangibles, domestic insurance companies, or public utilities, except to the extent they may be required by sections 5711.01 to 5711.41, inclusive, of the Revised Code, to make returns as fiduciaries. • • • "

On November 18, 1957, the Tax Commissioner of Ohio, pursuant to the authority given to him by the provisions

of Revised Code Section 5711.01 (B), adopted Rule No. 211, the pertinent portion of which Rule reads as follows:

> "Foreign insurance companies are hereby designated as taxpayers within the meaning of Section 5711.01, of the Revised Code, so as to require such foreign insurance companies to return tangible personal property subject to taxation under the laws of Ohio. This enumeration of foreign insurance companies as taxpayers is made under the authority granted the Tax Commis- [fol. 17] sioner in Section 5711.01 of the Revised Code, to define and designate the taxpayer as to any taxable property which would not otherwise be returned."

It is thus clear that the taxing statutes are drawn so as to include foreign insurance companies doing business in Ohio as "taxpayers" under the personal property tax laws of Ohio and the first question must, therefore, be answered in the affirmative.

The pertinent portion of Revised Code Section 5711.18, which section sets up the method for valuing tangible personal property used in business for tax purposes, reads as follows:

> "* * *. In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money. * * *."

It has become well established in Ohio that a "taxpayer" may, under the provisions of Revised Code Section 5711.18, list its tangible personal property on its tax return at its depreciated book value and that this value will prevail unless, and until, the Tax Commissioner exercises the prerogative given to him by the provisions of Revised Code Section 5711.18 to revalue the taxpayer's tangible personal property at what the Tax Commissioner considers to be its true value in money.

From the many cases that have been presented to it, the Board of Tax Appeals knows that many taxpayers depreciate their assets on their books of account at a rate which will reduce the book values thereof to zero even though the assets are still used in business and have many [fol. 18] years of useful life remaining. It is also well known that many corporations are granted, by the Federal Government, the right to use an accelerated depreciation rate for income tax purposes and to completely write off, on their books, the cost of capital assets in from three to five years even though the assets themselves will be in use for twenty-five years or more. We are also familiar with the fact that many Federal and State regulatory bodies require that asset valuation statements filed with them by persons or corporations under their jurisdiction be ultra-conservative. This is done to protect those members of the public who have dealings with said persons or corporations and is not done in any way to establish the actual value of the property for tax purposes.

In the case now before us, and even if it were to be assumed that the zero valuation given by the appellant to its furniture and equipment in its statement filed with the Superintendent of Insurance was, in fact, the "book value" of said property, it is obvious that the Tax Commissioner, in exercising the authority given to him by Revised Code Section 5711.18 to redetermine the value of tangible personal property for ad valorem tax purposes, is not required to accept the "book value" thereof, as the true value in money any more than he is bound to accept a particular "book value" which is permitted, or even required, by the Bureau of Internal Revenue or any other Federal, State or local department or bureau.

[fol. 19] The second question must, therefore, be answered in the affirmative.

Giving effect to the observations and conclusions above-noted, and again noting that this Board has no authority to declare a statute unconstitutional, the final orders of the Tax Commissioner herein complained of must be, and hereby are, affirmed, and this matter is remanded to the Tax Commissioner with instructions to that official to com-

ply with the provisions of the last paragraph of the stipulation, as agreed to by the parties.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

James E. Henry, Secretary.

[fol. 20]

IN THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO

FIRST APPELLATE DISTRICT

HAMILTON COUNTY, No. 9222

RESERVE LIFE INSURANCE COMPANY, Appellant,

vs.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

Appeal on Questions of Law, From the Board of Tax Appeals, State of Ohio.

Messrs. Dinsmore, Shohl, Barrett, Coates & Deupree, Union Central Building, Cincinnati, Ohio, for Appellant,

Messrs. William B. Saxbe and Daronne R. Tate, State House Annex, Columbus, Ohio, for Appellee.

OPINION--June 10, 1963

Hover, P.J.

This is an appeal from the Board of Tax Appeals. The Board determined appellant was subject to taxation on its personal property used in business. This finding approved ruling of the Tax Commissioner based upon his Rule No. 211 (November 18, 1957), stating in effect that foreign insur-[fol. 21] ance companies are required to make a return of their tangible personal property pursuant to the general taxing statutes of the State of Ohio.

The appellant is Reserve Life Insurance Company organized and existing under the laws of Texas. It is a stock company and has been authorized to conduct an insurance business in the state of Ohio since 1949. Appellant has heretofore claimed and now claims that the tax in question is not authorized by the statutes of Ohio; and that if authorized and levied, is violative of both the state and federal constitutions.

The matter is before this Court by virtue of Section 5717.04 of the Revised Code, which section provides the manner and form of proceedings to obtain a review of decisions of the Board of Tax Appeals.

The Tax Commissioner has filed a motion to dismiss the appeal on the ground that the statute above does not authorize this taxpayer to bring his action in the Court of Appeals for the First Appellate District of Ohio. The taxpayer, in support of his right to appeal to this Court, submits an affidavit to the effect that it maintains a regional executive office in Cincinnati, Ohio; that this office handles all of the company's business conducted in Ohio and various other named states; and that Cincinnati, Ohio is the principal place of business in Ohio for the company. The Tax Commissioner contends that any appeal by a foreign insurance corporation must be either directed to the Supreme [fol. 22] Court of Ohio or to the Court of Appeals for Franklin County. The company contends that it is a corporation and as such may appeal to the Court of Appeals for the county in which the corporation has its principal place of business in this state.

The problem is controlled by the Revised Code Section 5717.04 which, in its pertinent portion, reads as follows: "The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county

in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation or modification shall be by appeal to the court of appeals for Franklin county."

The obvious intent of the legislature in enacting this statute in its present form must be considered. Previously, all appeals from the Board of Tax Appeals were taken directly to the Supreme Court, resulting in an undue burden upon that court. The intent of the statute is clearly to spread the burden of tax appeal litigation. It would seem the in- [fol. 23] stant appeal to this Court is proper on two grounds —(1), at least a portion, and probably the bulk, of the property taxed is situated in this Appellate District; and (2), the corporation does have its principal place of business for the state of Ohio in this District. The provision for bringing tax appeals into the Court of Appeals for Franklin County is obviously intended as a "catch all" for instances not otherwise provided. The multiplicity of conflicting appeals feared by appellee is answered, in regard to corporations at least, by the statutory provision for combined corporate returns where property is held in more than one county.

For the above reasons, appellee's motion to dismiss the appeal is not well taken and is hereby overruled.

As to the merits of the appeal, it is obvious that appellant is a taxpayer of the state of Ohio as to this specific tax. Section 5711.01 Revised Code includes corporations generally doing business in the state of Ohio. The same section specifically excludes certain businesses from the definition of "taxpayer". Domestic insurance companies are excluded but are noted as "otherwise taxed".

Section 5709.01 of the Revised Code provides that all personal property located and used in business in this state is subject to taxation. Appellant is thus a taxpayer who is liable for a tax upon his personal property used in [fol. 24] business in this state. The mere fact that for other purposes peculiar to the insurance business, such personal property is not regarded either as an "asset" or as an "investment" does not affect the clear intention of the legislature to tax the personal property used in business of

a foreign insurance corporation authorized to do business in this state.

The specific rule No. 211 of the Tax Commissioner merely restates the law as the statute shows it to be. It would seem to be superfluous since the authority of the Commissioner to define and designate taxpayers is limited to "any taxable property which would not otherwise be required by this section to be returned". As already demonstrated, the section in question defines appellant as a taxpayer, and his property used in business is "taxable property" under these statutes.

Appellant further suggests the argument that it is already taxed by virtue of Section 5729.02 of the Revised Code at a higher rate of taxation than that levied as a similar tax against competing domestic insurance companies. While appellant admits there is nothing unlawful or unconstitutional in this practice, nevertheless, it should be noted in passing that the foreign company is not, under any circumstances, subject to the possibility of a tax upon its entire capital and surplus as is a domestic corporation.

Appellant, however, claims further that the tax upon his personal property is discriminatory and, as such, unconstitutional since this particular tax is not levied against domestic companies.

[fol. 25] If the tax structures with which we are here concerned involve a constitutional question it is not, as already observed, a problem created by Rule No. 211 of the Tax Commissioner. The tax on the personal property of appellant is levied by virtue of statutory enactments which are applicable to all corporations except those excluded by definition in Section 5711.01 (B) of the Revised Code. This exclusion (which is not an exemption because the excluded activities are otherwise taxed) concerns not only domestic insurance companies but other types of businesses where a direct ad valorem personal property tax not only may be neither practical nor just, but also otherwise provided. This is particularly true as regards domestic insurance companies, vis-a-vis foreign companies.

The power to determine the subject and methods of taxation in Ohio within broad constitutional limitations

(excepting real estate), is in the General Assembly by virtue of Article One of the Constitution, and Article Twelve Section Two thereof. This includes the power to effect reasonable tax classifications (State Ex Rel. Struble v. Davis, 132, O.S. 555, and related cases). This applies as well to the power to exempt personal property from taxation.

In regard to the appellant taxpayer and the tax levied against his personal property and not directly against that [fol. 26] of a domestic insurance company, it cannot be said that the General Assembly has specifically provided for any exemption in this respect. On the contrary, it is provided in Section 5725.18 of the Revised Code that such domestic companies shall be taxed according to the lesser of the two methods and by Section 5725.25 that the tax so levied shall be in lieu of other property taxes, except those upon real estate. Section 5725.18 of the Revised Code taxes either the capital and surplus of domestic insurance companies which of necessity includes a tax on all property actually owned by the company or, in the alternative, a tax upon gross premiums originating in the state. This is the same tax base provided as a franchise tax for foreign insurance companies. The net result is that the question of whether or not this particular tax is discriminatory against this particular taxpayer is not the controlling factor, the applicable principle being whether or not a specific tax is discriminatory between permissible classifications of taxpayers. Whether or not this particular tax system results in tax discrimination in the very narrow sense of one taxpayer paying more than another individual taxpayer, becomes a matter of mathematical calculation individual by individual,—a calculation in which courts are not constitutionally required or even permitted to indulge. The problems existing between foreign and domestic insurance companies in respect of methods and rates of taxation, are recognized by Section 5729.06 of the Revised Code [fol. 27] relative to retaliatory tax rates. Here again it would seem that whether or not a particular tax discriminates as between foreign and domestic taxpayers would involve, in addition, a consideration of the tax structure of the state of which the foreign corporation is a resident.

In City of Xenia v. Schmidt, 101 O. S. 438, the court considers the relationship between the constitutional guarantee of "equal protection of the laws" and the legislative authority to classify. The court states the controlling principle thusly: "The test, derived from the doctrines announced in both federal and state courts relative to classification, is this: Is there a real and substantial distinction in the classification attempted, or is it merely artificial, arbitrary or fictitious, made for the purpose of avoiding constitutional requirements? . . . These classifications, so far as they relate to such substantial distinctions, have always been upheld as within the constitutional provisions: Such has not only been the understanding and application in the courts of law, but likewise in the court of the common people in their daily transactions."

Under all the circumstances apparent in the record here, it cannot be considered that the imposition of an ad valorem tax on the tangible personal property of a foreign insurance company and otherwise taxing domestic insurance companies by the lesser of two formulae is an improper or unlawful classification of taxpayers or discriminatory either for or against the foreign company.

[fol. 28] Finally, it is difficult to see how the complaining taxpayer here could lawfully be granted the relief he seeks. Certainly this may not be done by declaring him to be exempt from the particular tax complained of,—distinguishing him from corporate taxpayers generally. Neither this Court nor the Tax Commissioner is authorized to effect tax exemptions by adding words to a statute. Conversely, in order to require domestic insurance companies to pay this tax would involve declaring two separate and distinct statutes unconstitutional. This the Court might, under some circumstances, be able to do by holding invalid the "in lieu" provision of Section 5725.25 of the Revised Code, but the Court may not itself legislate alleged equality by levying a tax against taxpayers (domestic insurance companies) where no such tax is now levied by the only body constitutionally authorized to do so, i.e., the General Assembly. (Compare Allied Stores v. Bowers, 166 O.S. 117.)

Accordingly, it is the opinion of the Court, (1) that the personal property used in business of the appellant tax-

payer is subject to listing and to taxation on the ad valorem basis provided by the general property tax law; and, (2) that the taxing distinction existing between domestic and foreign insurance companies is neither an unreasonable classification of taxpayers nor can it be said to discriminate either in favor of or against the two types of insurance companies; nor, under such circumstances, can it be held [fol. 29] violative of the equal protection clause of the constitution.

The decision of the Board of Tax Appeals is hereby affirmed.

Hildebrant and Long, JJ., concur.

[fol. 30]

IN THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO

FIRST APPELLATE DISTRICT

No. 9222

RESERVE LIFE INSURANCE COMPANY, Appellant,

vs.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

JOURNAL ENTRY—Entered July 18, 1963

This cause came on to be heard as an appeal from the Board of Tax Appeals and was submitted to the Court upon the certified transcript of the record of the proceedings before said Board, and the briefs and arguments of counsel.

Upon consideration whereof the Court finds:

1) The motion of appellee, Stanley J. Bowers, Tax Commissioner of Ohio, is not well taken.

2) The decision of the Board of Tax Appeals is neither unreasonable nor unlawful.

3) The personal property tax upon the Reserve Life Insurance Company does not violate the Constitution of the State of Ohio nor the Constitution of the United States.

It is therefore ordered, adjudged and decreed that the aforesaid motion of appellee to dismiss the appeal herein [fol. 31] be, and the same hereby is, overruled. It is further ordered, adjudged and decreed that the decision of the Board of Tax Appeals be, and the same hereby is, affirmed.

The costs herein are taxed against appellant.

To all of which appellant excepts.

It is further ordered that a special mandate issue to the Board of Tax Appeals to carry this judgment into execution.

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Approved:

Dinsmore, Shohl, Barrett, Coates & Deupree, By Harris K. Weston, Attorneys for Appellant.

William B. Saxbe, Attorney General; Daronne R. Tate, Assistant Attorney General; Attorneys for Appellee.

[fol. 32]

IN THE SUPREME COURT OF THE STATE OF OHIO

Case No. 38415

RESERVE LIFE INSURANCE Co., Appellant,

v.

STANLEY J. BOWERS, Tax Commr., Appellee.

Dinsmore, Shohl, Barrett, Coates & Deupree; Harris K. Weston, Union Central Building, Cincinnati, Ohio.

William B. Saxbe, Daronne R. Tate; State House Annex, Columbus, Ohio.

Appeal from the Court of Appeals for Hamilton County.

Motion for an order directing the Court of Appeals of Hamilton County to Certify its Record.

* * * * * * *

[fol. 34]

JOURNAL ENTRIES—January 22, 1964

* * * * * * *

JUDGMENT

Journal 46, Page 218

Appeal from the Court of Appeals for Hamilton County.

This cause, here on appeal as of right from the Court of Appeals for Hamilton County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant his costs herein expended; that a mandate be sent to the Court of Appeals to carry this judgment into

execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

[fol. 35] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 38415

RESERVE LIFE INSURANCE COMPANY, Appellant,

vs.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed March 20, 1964

I. Notice is hereby given that Reserve Life Insurance Company, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Ohio dismissing the appeal of Appellant from the Court of Appeals, First Appellate District, State of Ohio, entered in this cause on January 22, 1964. Said dismissal was "for the reason that no substantial constitutional question exists herein." This appeal is taken pursuant to 28 U.S.C.A., Section 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record, plus the opinion of the Court of Appeals, First Appellate District, State of Ohio.

III. The following question is presented by this appeal:

The Tax Commissioner of the State of Ohio, acting pursuant to Ohio statutes, assessed a personal property tax for the years 1948 through 1961 inclusive upon Appellant,

a foreign insurance company duly qualified to transact business in Ohio. The statutes of Ohio do not impose said personal property tax upon insurance companies incorporated in Ohio. The validity of this assessment was sustained by the Board of Tax Appeals, the Court of Appeals, [fol. 36] First Appellate District, State of Ohio, and by the Supreme Court of Ohio. The constitutionality of said tax under the Fourteenth Amendment to the Constitution of the United States was raised before the Tax Commissioner, and at each subsequent hearing. Thus, the question presented by this appeal is:

Whether the decision of the Supreme Court of Ohio, upholding the validity of statutes of the State of Ohio, particularly Sections 5711.01, 5711.18, 5711.22, and 5725.25 of the Ohio Revised Code of Ohio, imposing a personal property tax on Appellant, a foreign insurance company, when said personal property tax is not imposed on Ohio insurance companies, is correct, when the validity of said statutes was questioned on the ground that they were repugnant to the Fourteenth Amendment to the Constitution of the United States, and in particular Section 1 thereof.

Dinsmore, Shohl, Barrett, Coates & Deupree, Attorneys for Reserve Life Insurance Company, Appellant, By Harris K. Weston, 12th Floor Union Central Building, Cincinnati 2, Ohio.

[fol. 37] Certificate of Service (omitted in printing).

[fol. 38] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 38415

RESERVE LIFE INSURANCE COMPANY, Appellant,

vs.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed March 20, 1964

I. Notice is hereby given that Reserve Life Insurance Company, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals, First Appellate District, State of Ohio, affirming the decision of the Board of Tax Appeals, entered in this cause on July 18, 1963.

Appellant timely filed a notice of appeal to the Supreme Court of Ohio and a motion to certify the record of said cause to said Court. On January 22, 1964, the Supreme Court of Ohio overruled the Motion to Certify the Record, and on the same date dismissed the appeal "for the reason that no substantial constitutional question exists herein."

This appeal is taken pursuant to 28 U.S.C.A., Section 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record, plus the opinion of the Court of Appeals, First Appellate District, State of Ohio.

III. The following question is presented by this appeal:

The Tax Commissioner of the State of Ohio, acting pursuant to Ohio statutes, assessed a personal property tax for the years 1948 through 1961 inclusive upon Appellant,

a foreign insurance company duly qualified to transact business in Ohio. The statutes of Ohio do not impose said personal property tax upon insurance companies incorpo- [fol. 39] rated in Ohio. The validity of this assessment was sustained by the Board of Tax Appeals and by the Court of Appeals, First Appellate District, State of Ohio. The constitutionality of said tax under the Fourteenth Amendment to the Constitution of the United States was raised before the Tax Commissioner, and at each subsequent hearing. Thus, the question presented by this appeal is:

Whether the decision of the Court of Appeals, First Appellate District, State of Ohio, upholding the validity of statutes of the State of Ohio, particularly Sections 5711.01, 5711.18, 5711.22, and 5725.25 of the Ohio Revised Code of Ohio, imposing a personal property tax on Appellant, a foreign insurance company, when said personal property tax is not imposed on Ohio insurance companies, is correct, when the validity of said statutes was questioned on the ground that they were repugnant to the Fourteenth Amendment to the Constitution of the United States, and in particular Section 1 thereof.

Dinsmore, Shohl, Barrett, Coates & Deupree, Attorneys for Reserve Life Insurance Company, Appellant, By Harris K. Weston, 12th Floor, Union Central Building, Cincinnati 2, Ohio.

[fol. 40] Certificate of Service (omitted in printing).

[fol. 41]

SUPREME COURT OF THE UNITED STATES

No. 96—October Term, 1964

RESERVE LIFE INSURANCE COMPANY, Appellant,

vs.

STANLEY J. BOWERS, Tax Commissioner of Ohio.

ORDER NOTING PROBABLE JURISDICTION—October 12, 1964

Appeal from the Supreme Court of the State of Ohio.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. _____

RESERVE LIFE INSURANCE COMPANY,

Appellant,

v.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio and from the Court of Appeals, First Appellate District, State of Ohio

JURISDICTIONAL STATEMENT

Appellant Reserve Life Insurance Company appeals from an order of the Supreme Court of Ohio dismissing the appeal of Appellant from the Court of Appeals, First Appellate District, State of Ohio, and from the judgment of the latter Court.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio appears in 175 Ohio St. 468 and 196 N.E.2d 87. The opinion of the Court of Appeals, First Appellate District, State of Ohio, appears at 196 N.E. 2d 114. Both opinions are set out in the Appendix at p. 1a and p. 4a.

JURISDICTION

The statutes of Ohio levy upon foreign insurance companies a tax on personal property used in business, but do not levy this or any other personal property tax upon domestic insurance companies. When the State of Ohio sought to collect the personal property tax from Reserve Life Insurance Company, an insurance company organized and operating under the laws of the State of Texas, Reserve protested against the levy and collection of said tax on three grounds:

1. That the proper construction of Ohio statutes gave a value of zero to the personal property of Reserve Life Insurance Company, and that, consequently, no tax was due.
2. That levying the personal property tax upon foreign insurance companies and not domestic insurance companies is a violation of the Ohio Constitution.
3. That levying the personal property tax upon foreign insurance companies and not domestic insurance companies is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

These three points were raised and argued before the Tax Commissioner of Ohio and the Board of Tax Appeals of Ohio. Those two bodies ruled against Reserve Life Insurance Company on point 1, and stated that they had no authority to consider questions two and three. These questions were then raised before the Court of Appeals, First Appellate District, State of Ohio, which ruled against Appellant on all three points. The points were then raised by Appellant before the Supreme Court of Ohio which dismissed the appeal on January 22, 1964, "for the reason that no substantial constitutional question exists herein."

Notice of Appeal to the Supreme Court of the United States from the decision of the Supreme Court of Ohio was filed with the Supreme Court of Ohio on March 20, 1964. As a precautionary measure, Notice of Appeal to the Supreme Court of the United States was also filed on March 20, 1964, with the Supreme Court of Ohio, the court possessed of the record, from the judgment of the Court of Appeals, First Appellate District, State of Ohio, affirming the decision of the Board of Tax Appeals.

The statutory provision believed to confer on this Court jurisdiction of the appeal is 28 USCA Section 1257(2).

It is submitted that *Wheeling Steel Corp.* v. *Glander*, 337 US 562 (1949), is the principal case which directly sustains jurisdiction herein. The constitutionality of classifying the Appellant as a "Taxpayer" under Section 5711.01 of the Revised Code of Ohio, while domestic insurance companies are excluded from the definition of "Taxpayer" under that Section is directly involved. That statute and the following other relevant Sections of the Ohio Tax Laws are set out in the Appendix: Sections 5705.03, 5711.01, 5711.18, 5711.22, 5725.18, 5725.19, 5725.25, 5729.02 and 5729.03 of the Revised Code of Ohio.

QUESTION PRESENTED

The Tax Commissioner of the State of Ohio, acting pursuant to Ohio statutes, assessed a personal property tax on personal property used in business, for the years 1948 through 1961, inclusive, upon Appellant, a foreign insurance company duly qualified to transact business in Ohio. The statutes of Ohio do not impose this tax or any other personal property tax upon insurance companies incorporated in Ohio. The validity of this assessment was sustained by the Board of Tax Appeals and by the Court of Appeals, First Appellate District, State of Ohio, and by the Supreme Court of Ohio. The constitutionality of said

tax under the Fourteenth Amendment to the Constitution of the United States was raised before the Tax Commissioner and at each subsequent hearing. Thus, the question presented by this appeal is:

Whether a state statute imposing a tax upon personal property used in business of foreign insurance companies authorized to do business in the state violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, when neither this particular tax nor any other personal property tax is imposed upon domestic insurance companies, although both are subject to the same real estate tax and both are subject to a franchise tax which is always at least 50 per cent higher for the foreign company?

STATEMENT

Initially, there were two cases, one involving the years 1948 through 1960, inclusive, and the other involving the year 1961. The legal issues were identical, and so were the facts, except for the years involved. The cases were heard simultaneously by the General Hearing Board, which is a representative of the Tax Commissioner of Ohio, and were consolidated for hearing by the Board of Tax Appeals, and heard as a single case by the Court of Appeals, First Appellate District, State of Ohio, and by the Supreme Court of Ohio.

The parties entered into a stipulation of facts, duly filed with the Board of Tax Appeals. The stipulations were identical in the two cases, except for the years involved, and the stipulation in the first case was as follows:

> 1. Reserve Life Insurance Company (hereinafter sometimes referred to as "Reserve") is a legal reserve life insurance company, organized and existing under the laws of the State of Texas. It is a stock company and is owned by its stockholders.

2. Reserve does business in the District of Columbia and all states of the United States except Connecticut, Massachusetts, Michigan, New Jersey, New York and Rhode Island. It first began doing business in Ohio in the fall of 1947, and has continued ever since.

3. Since it began doing business in the State of Ohio, Reserve has annually filed a statement of Condition as of December 31 of each year, in accordance with Section 3909.06 of the Revised Code of Ohio, and has complied with all regulations of the Department of Insurance of the State of Ohio. It has paid its franchise tax annually.

4. Reserve has never paid a personal property tax to the State of Ohio. No request was directed to Reserve to pay such a tax until 1959. Reserve promptly raised the question of the applicability and constitutionality of the personal property tax law as applied to it, but supplied the Department of Taxation with valuation of its furniture and fixtures owned by it in the State of Ohio on January 1 for the years 1948 through 1960.

5. If the final determination of this controversy is that the personal property tax on furniture and fixtures is due from Reserve to the State of Ohio, the parties agree that the valuations supplied by Reserve to the State of Ohio for the years 1948 through 1960, by counties, are correct. In this event, the matter shall be referred to the taxing districts, reserving to Reserve full rights of appeal as to the property assigned by the Tax Commissioner to each taxing district.

The stipulation in the second case was identical, except that in paragraphs 4 and 5 the words "for the year 1961" were substituted in place of "for the years 1948 through 1960."

As indicated above, the Board of Tax Appeals held that it had no authority to declare a statute unconstitutional under either the State or Federal Constitution, and, accordingly, did not rule on the constitutional question here

involved. Appellant appealed the decision of the Board of Tax Appeals to the Court of Appeals, First Appellate District, State of Ohio, raising the constitutional issue by assignment of error No. 3, and that Court held that the personal property tax upon Reserve Life Insurance Company did not violate the Constitution of the United States. (See the last paragraph of the Opinion of the Court of Appeals and item 3 of the journal entry of said Court. Appendix p. 11a and p. 2a.) That decision was taken by appeal to the Supreme Court of Ohio, and again Appellant raised the present constitutional issue by assignment of error No. 3. Also as noted above, the latter Court dismissed the appeal "for the reason that no substantial constitutional question exists herein." (Appendix p. 1a)

THE QUESTION IS SUBSTANTIAL

This appeal raises a substantial question with respect to the interpretation of the Fourteenth Amendment to the United States Constitution, and in particular Section 1 of that Amendment.

This case is very similar to another case that came before this Court approximately fifteen years ago, which also involved the personal property tax of Ohio. In that case, this Court laid down the sound, controlling rule which is not being followed by the courts of Ohio in the present instance. That case was *Wheeling Steel Corporation* v. *Glander*, 337 US 562 (1949). There, this Court struck down as violative of the equal protection clause of the Constitution, Ohio's *ad valorem* tax on accounts receivable of foreign, but not domestic corporations, and stated at pages 571-572:

> "Under long-settled principles of our Federation, Ohio was not required to admit these foreign corporations to carry on intrastate business within its borders. The State may arbitrarily exclude them or may

> license them upon any terms it sees fit, apart from exacting surrender of rights derived from the Constitution of the United States. *Hanover Insurance Co.* v. *Harding*, 272 US 494, 507; *Connecticut General Co.* v. *Johnson*, 303 US 77, 79-80. Ohio elected, however, to admit these corporations to transact business and operate manufacturing plants in the State. For that privilege they have paid all that the State required by way of franchise or privilege tax, which includes in its measure the value of all property owned and business done in Ohio. §§ 5495, 5497, 5498, and 5499 of the Ohio General Code. See *International Harvester Co.* v. *Evatt*, 329 US 416. After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable *ad valorem* tax basis. *Hanover Insurance Co.* v. *Harding*, 272 US 494, 510-511; *Power Co.* v. *Saunders*, 274 US 490, 493, 497. Ohio holds this tax on intangibles to be an *ad valorem* property tax. *Bennett* v. *Evatt*, 145 Ohio St. 587, 62 N.E. 2d 345, and in no sense a franchise, privilege, occupation or income tax."

It has been stipulated that Appellant commenced doing business in Ohio in 1947 and has continued to do so ever since. This Court has repeatedly held that, for *ad valorem* tax purposes, the adopted foreign corporation must be treated on a par with domestic corporations if the requirement of equal protection is to be met. *Hanover Fire Ins. Co.* v. *Harding*, 272 US 494 (1926).

A difference in tax may, of course, be justified if it is predicated upon a reasonable basis or a reasonable classification. But, as has been said by this Court, in *Southern R. Co.* v. *Greene*, 216 US 400 (1910) at page 417:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just re-

lation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

What is the distinction between the tangible personal property owned and used by domestic insurance companies and that owned and used by foreign insurance companies? There can be no distinction in the type of property, or in the use thereof; the only possible distinction is that one company is a domestic one and the other company is a foreign one.

Since the Supreme Court of Ohio did not write an opinion, it is here necessary to analyze the holding of the Court of Appeals. That court, while not denying the difference in taxation, sought to avoid the obvious vulnerability of the present statute by arguing that personal property of a domestic insurance company was "not exempt" from taxation since the tax on its real estate and its franchise tax were "in lieu of" all other taxes. This reasoning will not stand close scrutiny.

Real estate taxes are identical for both kinds of companies, and obviously afford no room for "inclusion" of any kind of equalizing personal property tax burden on domestic companies.

Foreign insurance companies doing business in Ohio pay a franchise tax of 2.50 per cent of the gross premiums derived from business in Ohio for the preceding year. (Ohio Revised Code § 5729.02-.03) Domestic insurance companies pay the lower of two tax computations: Either (a) .002 per cent of the company's reported capital and surplus, less certain liabilities, or (b) .002 per cent of its gross premiums multiplied by eight and one-third. (Ohio Revised Code § 5725.18-.19) It is to be noted that an alternative computation is necessary in order to determine which

method produces the lesser tax for the domestic companies, but not for foreign companies. The second alternative for domestics and the sole method for foreign companies is based on gross premiums, but different rates are applied. For domestic companies, eight and one-third times the premiums is multiplied by two-tenths of one per cent (.002) for a tax rate of 1.67 per cent. For the foreign company, a per cent of 2.50 is applied against the premiums for the particular year. The conclusion is inescapable that *in all cases* the foreign company will pay a franchise tax at least 50 per cent higher (2.50 per cent is 50 per cent higher than 1.67 per cent) than that paid by the domestic insurance company doing the same amount of business. The disparity would be even greater if the computation under the first of the alternatives for domestic insurance companies resulted in a lower figure than the computation under the second alternative, since domestic companies only pay the lower of the two alternatives. Thus, the "in passing" reasoning of the Ohio Court of Appeals (Appendix, p. 8a) that, unlike domestic insurance companies, foreign companies were not subject to "the possibility" of a tax on their entire capital and surplus under the first alternative, which presumably would include the value of personal property, is without substance here where the franchise tax on the foreign company will always be at least 50 per cent more than on the domestic company. "Equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 US 64 (1963).

Appellant admits that there are cases which have held that the imposition of one type of tax on a certain type of property "in lieu of" another tax is constitutional, such as *Cincinnati Air Taxi, Inc.* v. *Bowers*, 173 Ohio St. 99 (1962), *Jersey Central Power & Light Co.* v. *Asbury Park*,

128 N.J.L. 141, 24 A2d 526 (1942), and *Landis TWP. v. Division of Tax Appeals*, 137 N.J.L. 224, 59 A2d 258 (1948). In each instance the property or company that is subject to one tax "in lieu of" another is not also subject to the other tax. Here, however, a foreign insurance company pays all the taxes that the domestic insurance company pays and in addition pays a higher rate on the franchise tax, plus a personal property tax. The personal property tax disadvantage to the foreign insurance company is apparent, and cannot be obfuscated by the "in lieu of" language contained in the real estate and franchise taxing provisions. If this taxing structure were permitted to stand, it would be equivalent to stating that Corporation A should pay taxes X, Y and Z, while Corporation B should pay X and Y only and in lieu of Z, and then maintaining that Corporations A and B are taxed equally.

The "final" point made by the Court of Appeals (Appendix, p. 10a) questioning whether the relief sought by Appellant could be granted without new discrimination or new legislation is clearly without merit, and serves only to demonstrate the absence of substance to sustain the tax. Appellant seeks no preferential treatment. On the contrary, the Appellant seeks equality with domestic insurance companies, and for that no new legislation is required. What Appellant does seek is to have the present Ohio personal property tax statute declared unconstitutional as it applies to foreign insurance companies. What follows that would, of course, be up to the Ohio legislature in the first instance.

The Ohio personal property tax is of considerable importance not only to the Appellant but to all foreign insurance companies authorized to do business in Ohio. The book value of Appellant's personal property in Ohio in 1948 (the first year here involved) was approximately $33,000, and it climbed ratably to a high of $110,000 in

1958. Additionally, the records of the Ohio Superintendent of Insurance reflect that as of July 1, 1963, there were 226 foreign life insurance companies and 397 foreign fire and casualty insurance companies authorized to do business in Ohio. The Appellant's situation is clearly not an isolated case. The scope of possible impact is further enlarged when we consider the effect that judicial approval of this unequal *ad valorem* taxation might have upon state taxing structures in general—49 other states might well then consider that they had the green light to impose similar discriminatory *ad valorem* taxes against foreign corporations.

CONCLUSION

We believe that the question presented by this appeal is substantial and of public importance, and that probable jurisdiction should, therefore, be noted.

Respectfully submitted,

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May 15, 1964.

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS
1964 TERM

To wit: Wednesday, January 22, 1964

No. 38415

RESERVE LIFE INSURANCE CO.,

Appellant,

v.

STANLEY J. BOWERS, TAX COMMR.,

Appellee.

Appeal from the Court of Appeals for Hamilton County

ORDER

This cause, here on appeal as of right from the Court of Appeals for Hamilton County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant his costs herein expended; that a mandate be sent to the Court of Appeals to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

Appendix B

APPENDIX B

IN THE
COURT OF APPEALS, HAMILTON COUNTY, OHIO
FIRST APPELLATE DISTRICT

No. 9222

RESERVE LIFE INSURANCE COMPANY,
Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee.

JOURNAL ENTRY

This cause came on to be heard as an appeal from the Board of Tax Appeals and was submitted to the Court upon the certified transcript of the record of the proceedings before said Board, and the briefs and arguments of counsel.

Upon consideration whereof the Court finds:

1) The motion of appellee, Stanley J. Bowers, Tax Commissioner of Ohio, is not well taken.

2) The decision of the Board of Tax Appeals is neither unreasonable nor unlawful.

3) The personal property tax upon the Reserve Life Insurance Company does not violate the Constitution of the State of Ohio nor the Constitution of the United States.

It is therefore ordered, adjudged and decreed that the aforesaid motion of appellee to dismiss the appeal herein be, and the same hereby is, overruled. It is further ordered, adjudged and decreed that the decision of the Board of Tax Appeals be, and the same hereby is, affirmed.

The costs herein are taxed against appellant.

To all of which appellant excepts.

It is further ordered that a special mandate issue to the Board of Tax Appeals to carry this judgment into execution.

Approved:

DINSMORE, SHOHL, BARRETT, COATES & DEUPREE,
By /s/. HARRIS K. WESTON,
Attorneys for Appellant,

/s/ WILLIAM B. SAXBE,
WILLIAM B. SAXBE,
Attorney General,

/s/ DARONNE R. TATE,
DARONNE R. TATE,
Assistant Attorney General,
Attorneys for Appellee.

APPENDIX C

IN THE
COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO

Hamilton County, No. 9222

RESERVE LIFE INSURANCE COMPANY,
Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee.

Appeal on Questions of Law, from the Board of Tax Appeals, State of Ohio

---

OPINION

(Filed June 10, 1963)

MESSRS. DINSMORE, SHOHL, BARRETT, COATES & DEUPREE, Union Central Building, Cincinnati, Ohio, *for Appellant,*

MESSRS. WILLIAM B. SAXBE and DARONNE R. TATE, State House Annex, Columbus, Ohio, *for Appellee.*

HOVER, P. J.

This is an appeal from the Board of Tax Appeals. The Board determined appellant was subject to taxation on its personal property used in business. This finding approved

ruling of the Tax Commissioner based upon his Rule No. 211 (November 18, 1957), stating in effect that foreign insurance companies are required to make a return of their tangible personal property pursuant to the general taxing statutes of the state of Ohio.

The appellant is Reserve Life Insurance Company organized and existing under the laws of Texas. It is a stock company and has been authorized to conduct an insurance business in the state of Ohio since 1949. Appellant has heretofore claimed and now claims that the tax in question is not authorized by the statutes of Ohio; and that if authorized and levied, is violative of both the state and federal constitutions.

The matter is before this Court by virtue of Section 5717.04 of the Revised Code, which section provides the manner and form of proceedings to obtain a review of decisions of the Board of Tax Appeals.

The Tax Commissioner has filed a motion to dismiss the appeal on the ground that the statute above does not authorize this taxpayer to bring his action in the Court of Appeals for the First Appellate District of Ohio. The taxpayer, in support of his right to appeal to this Court, submits an affidavit to the effect that it maintains a regional executive office in Cincinnati, Ohio; that this office handles all of the company's business conducted in Ohio and various other named states; and that Cincinnati, Ohio is the principal place of business in Ohio for the company. The Tax Commissioner contends that any appeal by a foreign insurance corporation must be either directly to the Supreme Court of Ohio or to the Court of Appeals for Franklin County. The company contends that it is a corporation and as such may appeal to the Court of Appeals for the county in which the corporation has its principal place of business in this state.

Appendix C

The problem is controlled by the Revised Code Section 5717.04 which, in its pertinent portion, reads as follows:

> "The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation or modification shall be by appeal to the court of appeals for Franklin county."

The obvious intent of the legislature in enacting this statute in its present form must be considered. Previously, all appeals from the Board of Tax Appeals were taken directly to the Supreme Court, resulting in an undue burden upon that court. The intent of the statute is clearly to spread the burden of tax appeal litigation. It would seem the instant appeal to this Court is proper on two grounds—(1), at least a portion, and probably the bulk, of the property taxed is situated in this Appellate District; and (2), the corporation does have its principal place of business for the state of Ohio in this District. The provision for bringing tax appeals into the Court of Appeals for Franklin County is obviously intended as a "catch all" for instances not otherwise provided. The multiplicity of conflicting appeals feared by appellee is answered, in regard to corporations at least, by the statutory provision

for combined corporate returns where property is held in more than one county.

For the above reasons, appellee's motion to dismiss the appeal is not well taken and is hereby overruled.

As to the merits of the appeal, it is obvious that appellant is a taxpayer of the state of Ohio as to this specific tax. Section 5711.01 Revised Code includes corporations generally doing business in the state of Ohio. The same section specifically excludes certain businesses from the definition of "taxpayer." Domestic insurance companies are excluded but are noted as "otherwise taxed."

Section 5709.01 of the Revised Code provides that all personal property located and used in business in this state is subject to taxation. Appellant is thus a taxpayer who is liable for a tax upon his personal property used in business in this state. The mere fact that for other purposes peculiar to the insurance business, such personal property is not regarded either as an "asset" or as an "investment" does not affect the clear intention of the legislature to tax the personal property used in business of a foreign insurance corporation authorized to do business in this state.

The specific rule No. 211 of the Tax Commissioner merely restates the law as the statute shows it to be. It would seem to be superfluous since the authority of the Commissioner to define and designate taxpayers is limited to "any taxable property which would not otherwise be required by this section to be returned." As already demonstrated, the section in question defines appellant as a taxpayer, and his property used in business is "taxable property" under these statutes.

Appellant further suggests the argument that it is already taxed by virtue of Section 5729.02 of the Revised

Code at a higher rate of taxation than that levied as a similar tax against competing domestic insurance companies. While appellant admits there is nothing unlawful or unconstitutional in this practice, nevertheless, it should be noted in passing that the foreign company is not, under any circumstances, subject to the possibility of a tax upon its entire capital and surplus as is a domestic corporation.

Appellant, however, claims further that the tax upon his personal property is discriminatory and, as such, unconstitutional since this particular tax is not levied against domestic companies.

If the tax structures with which we are here concerned involve a constitutional question it is not, as already observed, a problem created by Rule No. 211 of the Tax Commissioner. The tax on the personal property of appellant is levied by virtue of statutory enactments which are applicable to all corporations except those excluded by definition in Section 5711.01 (B) of the Revised Code. This exclusion (which is not an exemption because the excluded activities are otherwise taxed) concerns not only domestic insurance companies but other types of businesses where a direct ad valorem personal property tax not only may be neither practical nor just, but also otherwise provided. This is particularly true as regards domestic insurance companies, vis-a-vis foreign companies.

The power to determine the subject and methods of taxation in Ohio within broad constitutional limitations (excepting real estate), is in the General Assembly by virtue of Article One of the Constitution, and Article Twelve Section Two thereof. This includes the power to effect reasonable tax classifications (*State ex. Rel. Struble* v. *Davis*, 132 O. S. 555, and related cases). This applies as well to the power to exempt personal property from taxation.

Appendix C

In regard to the appellant taxpayer and the tax levied against his personal property and not directly against that of a domestic insurance company, it cannot be said that the General Assembly has specifically provided for any exemption in this respect. On the contrary, it is provided in Section 5725.18 of the Revised Code that such domestic companies shall be taxed according to the lesser of two methods and by Section 5725.25 that the tax so levied shall be in lieu of other property taxes, except those upon real estate. Section 5725.18 of the Revised Code taxes either the capital and surplus of domestic insurance companies which of necessity includes a tax on all property actually owned by the company or, in the alternative, a tax upon gross premiums originating in the state. This is the same tax base provided as a franchise tax for foreign insurance companies. The net result is that the question of whether or not this particular tax is discriminatory against this particular taxpayer is not the controlling factor, the applicable principle being whether or not a specific tax is discriminatory between permissible classifications of taxpayers. Whether or not this particular tax system results in tax discrimination in the very narrow sense of one taxpayer paying more than another individual taxpayer, becomes a matter of mathematical calculation individual by individual,—a calculation in which courts are not constitutionally required or even permitted to indulge. The problems existing between foreign and domestic insurance companies in respect of methods and rates of taxation, are recognized by Section 5729.06 of the Revised Code relative to retaliatory tax rates. Here again it would seem that whether or not a particular tax discriminates as between foreign and domestic taxpayers would involve, in addition, a consideration of the tax structure of the state of which the foreign corporation is a resident.

Appendix C

In *City of Xenia* v. *Schmidt*, 101 O. S. 438, the court considers the relationship between the constitutional guarantee of "equal protection of the laws" and the legislative authority to classify. The court states the controlling principle thusly:

> "The test, derived from the doctrines announced in both federal and state courts relative to classification, is this: Is there a real and substantial distinction in the classification attempted, or is it merely artificial, arbitrary or fictitious, made for the purpose of avoiding constitutional requirements? . . . These classifications, so far as they relate to such substantial distinctions, have always been upheld as within the constitutional provisions. Such has not only been the understanding and application in the courts of law, but likewise in the court of the common people in their transactions."

Under all the circumstances apparent in the record here, it cannot be considered that the imposition of an ad valorem tax on the tangible personal property of a foreign insurance company and otherwise taxing domestic insurance companies by the lesser of two formulae is an improper or unlawful classification of taxpayers or discriminatory either for or against the foreign company.

Finally, it is difficult to see how the complaining taxpayer here could lawfully be granted the relief he seeks. Certainly this may not be done by declaring him to be exempt from the particular tax complained of,—distinguishing him from corporate taxpayers generally. Neither this Court nor the Tax Commissioner is authorized to effect tax exemptions by adding words to a statute. Conversely, in order to require domestic insurance companies to pay this tax would involve declaring two separate and distinct

statutes unconstitutional. This the Court might, under some circumstances, be able to do by holding invalid the "in lieu" provision of Section 5725.25 of the Revised Code, but the Court may not itself legislate alleged equality by levying a tax against taxpayers (domestic insurance companies) where no such tax is now levied by the only body constitutionally authorized to do so, i. e., the General Assembly. (Compare *Allied Stores* v. *Bowers*, 166 O. S. 117).

Accordingly, it is the opinion of the Court, (1) that the personal property used in business of the appellant taxpayer is subject to listing and to taxation on the ad valorem basis provided by the general property tax law; and, (2) that the taxing distinction existing between domestic and foreign insurance companies is neither an unreasonable classification of taxpayers nor can it be said to discriminate either in favor of or against the two types of insurance companies; nor, under such circumstances, can it be held violative of the equal protection clause of the constitution.

The decision of the Board of Tax Appeals is hereby affirmed.

HILDEBRANT and LONG, J.J., CONCUR.

APPENDIX D

5705.03 (5625-3). Authorization to levy taxes; collection.

The taxing authority of each subdivision may levy taxes annually, subject to the limitations of sections 5705.01 to 5705.47, inclusive, of the Revised Code, on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and acquiring or constructing permanent improvements. The taxing authority of each subdivision and taxing unit shall, subject to the limitations of such sections, levy such taxes annually as are necessary to pay the interest and sinking fund on and retire at maturity the bonds, notes, and certificates of indebtedness of such subdivision and taxing unit, including levies in anticipation of which the subdivision or taxing unit has incurred indebtedness. All taxes levied on property shall be extended on the tax duplicate by the county auditor of the county in which the property is located, and shall be collected by the county treasurer of such county in the same manner and under the same laws, rules, and regulations as are prescribed for the assessment and collection of county taxes. The proceeds of any tax levied by or for any subdivision when received by its fiscal officer shall be deposited in its treasury to the credit of the appropriate fund.

5711.01 (5366) (5389-3). Definitions.

[See, in particular, paragraph (B)]

As used in sections 5711.01 to 5711.41, inclusive, of the Revised Code:

(A) "Taxable property" includes all the kinds of property, except real property, mentioned in sections 5709.01 and 5709.02 of the Revised Code, and also the amount or value as of the date of conversion of all taxable property

converted into bonds or other securities not taxed on or after the first day of November in the year preceding the date of listing, and of all other taxable property converted into deposits after the date as of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent he may hold or control such bonds, securities, or deposits on such day, without deduction for indebtedness created in the purchase of such bonds or securities from his credits; but taxable property does not include such investments and deposits as are taxable at the source as provided in sections 5725.01 to 5725.26, inclusive, of the Revised Code, nor surrender values under policies of insurance.

(B) "Taxpayer" means any owner of taxable property and includes every person residing in, or incorporated or organized by or under the laws of this state, or doing business in this state, or owning or having a beneficial interest in taxable personal property in this state and every fiduciary required by sections 5711.01 to 5711.41, inclusive, of the Revised Code to make a return for or on behalf of another. The tax commissioner may by regulations define and designate the taxpayer, as to any taxable property which would not otherwise be required by this section to be returned; and any such regulation shall be considered supplementary to the enumeration of kinds of taxpayers following:

(1) Individuals of full age and sound mind residing in this state;

(2) Partnerships, corporations, associations, and joint-stock companies, under whatever laws organized or existing, doing business or having taxable property in this state; and corporations incorporated by or organized under the laws of this state, wherever their actual business is conducted;

(3) Fiduciaries appointed by any court in this state or having title, possession, or custody of taxable personal property in this state or engaged in business in this state.

Taxpayer excludes all individuals, partnerships, corporations, associations, and joint-stock companies, their executors, administrators, and receivers who are defined in Title LVII of the Revised Code as financial institutions, dealers in intangibles, domestic insurance companies, or public utilities, except to the extent they may be required by sections 5711.01 to 5711.41, inclusive, of the Revised Code, to make returns as fiduciaries.

(C) "Return" means the taxpayers' annual report of taxable property.

(D) "List" means the designation, in a return, of the description of taxable property, the valuation or amount thereof, the name of the owner, and the taxing district where assessable.

(E) "Taxing district" means, in the case of property assessable on the classified tax list and duplicate, a municipal corporation or the territory in a county outside the limits of all municipal corporations therein; in the case of property assessable on the general tax list and duplicate, a municipal corporation or township, or part thereof, in which the aggregate rate of taxation is uniform.

(F) "Assessor" includes the tax commissioner and the county auditor as deputy of the commissioner.

(G) "Fiduciary" includes executors, administrators, parents, guardians, receivers, assignees, official custodians, factors, bailees, lessees, agents, attorneys, and employees, but fiduciary does not include trustees unless the sense requires that it shall do so.

(H) "General tax list and duplicate" means the books or records containing the assessments of property subject to local tax levies.

(I) "Classified tax list and duplicate" means the books or records containing the assessments of property not subject to local tax levies.

(J) "Investment company" means any corporation, the shares of which are regularly offered for sale to the public, engaged solely in the business of investing and reinvesting funds in real property or investments, or the holding or the sale thereof for the purpose of realizing income or profit which is distributed to its shareholders. Investment company does not include any dealer in intangibles, as defined in section 5725.01 of the Revised Code.

5711.18 (5389). Valuation of accounts and personal property; procedure; income yield.

In the case of accounts receivable, the book value thereof less book reserves shall be listed and shall be taken as the true value thereof unless the assessor finds that such net book value is greater or less than the then true value of such accounts receivable in money. In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from net book value of accounts receivable or depreciated book value of personal property must be made in writing by the taxpayer at the time of making his return; and when such return is made to the county auditor who is required by sections 5711.01 to 5711.41, inclusive, of the Revised Code, to transmit it to the tax commissioner for assessment, the auditor shall, as deputy of the commissioner, investigate such claim and shall enter thereon, or attach thereto, in such form as the commissioner prescribes, his findings and

recommendations with respect thereto; when such return is made to the commissioner, such claim for deduction from depreciated book value of personal property shall be referred to the auditor, as such deputy, of each county in which the property affected thereby is listed for investigation and report.

5711.22 (5388). Listing and rates of personal property tax.

Except as otherwise provided, personal property shall be listed and assessed at seventy per cent of its true value in money on the day that it is required to be listed or on the days or at the times that it is required to be estimated on the average basis. Deposits not taxed at the source shall be listed and assessed at their amount in dollars on the day that they are required to be listed. Moneys shall be listed and assessed at the amount thereof in dollars on hand on the day that they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, except as otherwise provided in sections 5711.01 to 5711.41, inclusive, of the Revised Code, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either division (A) or division (B) of section 5701.06 of the Revised Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at their true value in money on the day that such investments are required to be listed.

Credits and other taxable intangibles shall be listed and assessed at their true value in money on the day as of which the same are required to be listed.

Personal property, used in business, shall be listed and assessed at fifty per cent of its true value in money on the

day that it is required to be listed or on the days or at the time that it is required to be estimated on the average basis as follows:

(A) All engines, machinery, tools, and implements of a manufacturer mentioned in section 5711.16 of the Revised Code, and all engines and machinery used or designed to be used in mining, and all tools and implements used or designed to be used for such purpose, excepting as provided in the last paragraph of this section, and all engines, machinery, tools, and implements used in stone plants and gravel plants, and all engines, machinery, tools, implements, and domestic animals used in agriculture, and all machinery, implements, and tools used in laundries, towel, and linen supply and dry cleaning plants, and all engines, machinery, tools, implements, and other equipment used in radio and television broadcasting, except as any of the kinds of property mentioned in this division may have been legally regarded as improvements on land and considered in arriving at the value of real property assessed for taxation;

(1) The average value of all articles purchased, received or otherwise held by a manufacturer for the purpose of being used in manufacturing, combining, rectifying, or refining;

(2) The average value of all articles which were at any time manufactured or changed in any way by the taxpayer, either by combining or rectifying, or refining or adding thereto, but not including finished products unless kept or stored at the place of manufacture or at a warehouse in the same county therewith;

(3) Agricultural products on farms.

Boilers, machinery, equipment, and personal property used for the generation or distribution of electricity other

than for the use of the person generating or distributing such electricity shall be listed and assessed at its true value in money on the day that it is required to be listed. (125 v 903. Eff. 10-1-53.)

5725.18 (5414-9). Annual franchise tax on the privilege of being an insurance company.

An annual franchise tax on the privilege of being an insurance company is hereby levied, measured by the smaller of the following bases as applied to a domestic insurance company:

(A) The capital and surplus of a domestic insurance company having capital divided into shares, or the surplus of a domestic insurance company not having capital divided into shares, at the value thereof reported by the company in its annual statement for the preceding year filed with and approved by the superintendent of insurance setting forth the admitted and nonadmitted assets and the liabilities of the company, including in such liabilities:

(1) The reserve and unearned premium liabilities computed as provided by law, the same being the amount of debts of an insurance company because of its outstanding policies in gross;

(2) Amounts set apart for the payment of dividends to policyholders, and all actual liabilities set forth in the annual statement;

(B) Eight and one-third times the gross amount of premiums received by any such domestic insurance company from policies covering risks within this state during the preceding calendar year, after making the deductions prescribed by section 5729.03 of the Revised Code for foreign insurance companies. The objects of such tax are those declared in section 5725.24 of the Revised Code, to which only the same shall be applied.

Appendix D

5725.19 (5414-13). Rate of franchise tax on domestic insurance companies.

In the month of June, annually, the auditor of state shall charge for collection from each domestic insurance company a franchise tax of two tenths of one per cent of the amount determined by the superintendent of insurance pursuant to section 5725.18 of the Revised Code and certified to the auditor of state. In no case shall such tax be less than twenty-five dollars.

5725.25 (5414-10). Tax on real estate of domestic insurance company.

The real estate of a domestic insurance company shall be taxed in the place where it is located, the same as the real estate of other persons is taxed, but the tax provided for by sections 5725.01 to 5725.26, inclusive, of the Revised Code, shall be in lieu of all other taxes on the other property and assets of such domestic insurance company and of all other taxes, charges, and excises on such domestic insurance companies, and of all other taxes on the stockholders, members, or policyholders of such company by reason of their stock or other interest in such insurance company, except as to annuities or the right to receive the proceeds of a policy payable after its maturity in installments, or left with the company at interest. Sections 5725.01 to 5725.26, inclusive, of the Revised Code do not assess any tax on any foreign insurance company or affect any tax on a foreign insurance company under any laws of this state.

5729.02 (5432). Annual statements of foreign insurance companies.

Every insurance company incorporated by the authority of another state or government shall set forth in its annual

statement to the superintendent of insurance the gross amount of premiums received by it from policies covering risks within this state during the preceding calendar year, less return premiums paid for cancellations and considerations received for reinsurance of risks within this state, provided that dividends paid or otherwise allowed to policyholders shall not be deducted except as provided in section 5729.04 of the Revised Code. If the superintendent has reason to suspect the correctness of such statement he may make an examination at the expense of the state of the books of such company or its agents for the purpose of verifying them.

5729.03 (5433). Computation and collection of tax.

If the superintendent of insurance finds the annual statement required by section 5729.02 of the Revised Code to be correct, he shall compute an amount of two and one-half per cent of the balance of such gross amount, after deducting such return premiums and considerations received for reinsurance, and charge such amount to such company as a tax upon the business done by it in this state for the period covered by such annual statement. All taxes collected pursuant to this section shall be credited to the general revenue fund.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1126

On Appeal from the Supreme Court of Ohio and from the Court of Appeals, First Appellate District, State of Ohio

RESERVE LIFE INSURANCE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

STATEMENT OPPOSING JURISDICTIONAL STATEMENT AND MOTION TO DISMISS OR AFFIRM

I. STATEMENT OF ISSUE

Appellant is a Texas insurance company authorized to conduct an insurance business in Ohio. For the privilege of doing so it pays an annual franchise tax. Domestic insurance companies are also required to pay such a tax. The statutory formula for the tax computation is not, however, the same. Both domestic and foreign insurance com-

panies are required to pay a tax on real estate where the same is located.

The provision of the Ohio law principally involved is Section 5725.25, Revised Code, which provides:

> "The real estate of a domestic insurance company shall be taxed in the place where it is located, the same as the real estate of other persons is taxed, but the tax provided for by sections 5725.01 to 5725.26, inclusive, of the Revised Code, *shall be in lieu of all other taxes* on the other property and assets of such domestic insurance company and of all other taxes, charges, and excises on such domestic insurance companies, * * *" (Emphasis added)

With the foregoing as background, attention is now directed to a statement at page two of appellant's brief. The first sentence under the heading "JURISDICTION" reads:

> "The statutes of Ohio levy upon foreign insurance companies a tax on personal property used in business, *but do not levy this or any other personal property tax upon domestic insurance companies.* * * *"
> (Emphasis added)

This statement implies that there is a lack of equal protection after a foreign company has been admitted to do an insurance business in Ohio. However, such is not the situation and there is no denial of equal protection in that the statutes can be construed to produce a discriminatory result.

What gave rise to the controversy below is that Ohio levied an *ad valorem* tax on furniture and fixtures used in business by appellant. The authority to do so was challenged by appeal from the Tax Commissioner's above action to the Board of Tax Appeals which is a quasi-judicial body without authority to declare an Ohio statute unconstitutional. The Tax Commissioner's action was affirmed.

The above Board's decision was appealed to the Court of Appeals having jurisdiction to review the same. A refusal to reverse resulted in a request that the Supreme Court of Ohio, as the court of last resort, review the case. The appeal as of right was denied for the reason that no substantial constitutional question was found to exist.

The appellant claims herein that there is a Federal constitutional question in that the upheld Ohio taxing statutes violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In opposition thereto it is respectfully suggested no such question exists.

II. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

Appellant places principal reliance on *Wheeling Steel Corp. v. Glander* (1949), 337 U. S., 562. The decision therein pivoted on the proposition that the Ohio taxing statutes denied equal protection because certain intangible property of foreign corporations was subjected to taxation, whereas the same kind of property was exempt from taxation when owned by domestic corporations.

Appellant bottoms its entire case on the proposition that furniture and fixtures of a domestic insurance company are *exempt* from taxation but are subject to taxation when owned by a foreign insurance company. The Ohio laws do not so provide and cannot be so construed. The statutory mandate that the privilege or franchise tax against a domestic company "shall be in lieu of all other taxes" does not operate as an "exemption" from taxation as that term must be understood.

Appellant has shied away from claiming in specific terms that the Ohio law provides for a tax exemption for a domestic company that is denied to a foreign company in

respect of the same tangible property. However, there is the inference in brief that domestics and foreigns do not receive equal treatment and hence the Ohio personal property statute that subjected appellant's furniture and fixtures to taxation should be declared unconstitutional as applied to foreign insurance companies.

There is in reality no Federal constitutional question. The jurisdiction of this Court is accordingly erroneously sought to be invoked.

Wherefore, it is respectfully submitted that this appeal should be dismissed or that the judgment and decree of the Ohio Supreme Court disallowing the appeal as of right should be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 11 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 96

RESERVE LIFE INSURANCE COMPANY, *Appellant*,

v.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

On Appeal From the Supreme Court of Ohio and From the Court of Appeals, First Appellate District, State of Ohio

BRIEF OF THE APPELLANT

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On Appeal From the Supreme Court of Ohio and From the Court of Appeals, First Appellate District, State of Ohio

---

BRIEF OF THE APPELLANT

This appeal is from an order of the Supreme Court of Ohio dismissing the appeal of Appellant from the Court of Appeals, First Appellate District, State of Ohio, and from the judgment of the latter Court.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio appears in 175 Ohio St. 468 and 196 N.E.2d 87. The opinion of the Court of Appeals, First Appellate District, State of Ohio, appears at 196 N.E.2d 114.

JURISDICTION

Jurisdiction in this case is predicated upon 28 U.S.C., section 1257(2). This appeal draws in question the validity of certain taxing statutes of the State of Ohio on the ground of their repugnancy to the Constitution of the United States, which repugnancy the Ohio courts refused to recognize in deciding in favor of the validity of such statutes.

Appellant's appeal to the Supreme Court of Ohio was dismissed on January 22, 1964 (R. 26). Notices of appeal to this Court were timely filed on March 20, 1964 (R. 27, 29), and this Court noted probable jurisdiction on October 12, 1964 (R. 31).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appellant relies upon the Fourteenth Amendment to the United States Constitution, and more particularly the "equal protection of the laws" clause of section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S.C., Const. Amend. 14, § 1.)

The Ohio statute specifically involved is section 5711.01 of the Revised Code of Ohio, under which the Appellant, a foreign insurance corporation, is defined as a "taxpayer" for *ad valorem* personal property tax purposes, while domestic insurance companies are "excluded" therefrom. Also directly involved is section 5725.25 of the Revised Code of Ohio providing that in the case of domestic insurance companies, franchise taxes and real estate taxes "shall be in lieu of all other taxes" against them or their property. The texts of these two sections and of other relevant sections (5709.01, 5709.02, 5709.03, 5711.18, 5711.22, 5725.01, 5725.18, 5725.19, 5729.02, 5729.03 and 5729.06) of the Revised Code of Ohio are set forth in the Appendix hereto.

QUESTION PRESENTED

In summary form, the question presented is:

Whether a state statute imposing an *ad valorem* tax upon tangible personal property of foreign insurance companies authorized to do business in the state violates the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States when neither the particular tax nor any other personal property tax is imposed upon domestic insurance companies, although both kinds of companies are subject to the same real estate tax, neither is taxed on intangible personal property, and both are subject to a franchise tax which is always at least 50 per cent higher for the foreign companies?

STATEMENT OF THE CASE

The Appellant is a legal reserve, stock life insurance company organized and existing under the laws of Texas. It qualified to do business in Ohio as a foreign corporation in 1947 and has since continued its qualification and business in Ohio. It has paid its franchise tax annually (R. 8-9). As a foreign insurance corporation, Appellant's franchise tax is always at least 50% more than that of domestic insurance companies (App. 11a, 12a, 13a), and it is subject to exactly the same real estate taxes as are domestic insurance companies (App. 1a, 12a). Neither kind of company pays a tax on intangible personal property (App. 1a-2a, 12a).

The Appellant has never paid a personal property tax to the State of Ohio (R. 9). No attempt was made to collect such a tax from Appellant until 1959 (R. 9). This attempt was apparently based upon a ruling of the Tax Commissioner (Rule No. 211, November 18, 1957) requiring foreign insurance companies to make a return of their tangible personal property pursuant to section 5711.01 of the Revised Ohio Code (R. 15-16). This Rule did not include domestic insurance companies, and no attempt has ever been made to collect any personal property tax from them.

The Appellant promptly raised the question of the applicability and constitutionality of the personal property tax law as applied to it and not to domestic insurance companies, but supplied the Department of Taxation with the valuation of its furniture and fixtures in the State of Ohio for the years 1948 through 1960, and for the year 1961 (R. 9, 10). These valuations ranged from a low of $33,000 in 1948 to a high of $110,000 in 1958 (R. 2, 3). The contested taxes for the

two different periods (1948 through 1960, and 1961), initially treated as two separate cases, were heard as one case by the Board of Tax Appeals, by the Court of Appeals, First Appellate District, State of Ohio, and by the Supreme Court of Ohio (R. 11 et seq).

The Board of Tax Appeals held that it had no authority to declare a statute unconstitutional under either the State or Federal Constitution, and accordingly, did not rule on the constitutional question here involved (R. 14-15, 17). In affirming the Board of Tax Appeals, the Court of Appeals, First Appellate District, State of Ohio, held that the personal property tax upon Appellant did not violate the Constitution of the United States (R. 24, 25). And the Supreme Court of Ohio dismissed the appeal to it on the same constitutional issue, "for the reason that no substantial constitutional question exists herein" (R. 26).

SUMMARY OF ARGUMENT

I.

In attempting to tax the tangible personal property (furniture and fixtures) of foreign insurance companies, but not of domestic insurance companies, the State of Ohio is denying the equal protection of its laws to the Appellant foreign insurance company.

It is rather surprising that such an attempt would be made in the face of a controlling decision by this Court in a similar case from Ohio (*Wheeling Steel Corporation* v. *Glander,* 337 U.S. 562 (1949)), outlawing a parallel *ad valorem* tax on accounts receivable of a foreign corporation, but not of domestic corporations.

In each case, the foreign corporation was subject to the same real estate taxes as the domestic corporation,

and in each case the foreign corporation had paid without challenge the franchise taxes required of it. Moreover, in the present case, it clearly appears that the franchise tax paid by the foreign insurance company is always at least 50% more than the franchise tax paid by a domestic insurance company on the same amount of business.

The lack of equal protection in Ohio's statutes taxing *tangible* personal property of a foreign insurance company, but not of a domestic insurance company, is further underscored by the fact that in the case of *intangible* personal property, Ohio affords equal protection in that both kinds of companies are relieved from taxes on intangibles.

II.

The defenses offered in support of the tax in question serve only to confirm its basic unfairness and invalidity.

The fact that the personal property of domestic insurance companies is not expressly "exempted," by that very word, can be of no consequence. The specific section under which the Appellant is taxed (Ohio Rev. Code, § 5711.01), "excludes" domestic insurance companies from the definition of "taxpayer"; and another section (Ohio Rev. Code, § 5725.25) provides that the real estate and franchise taxes paid by domestic insurance companies shall be "in lieu of all other taxes." This language seems pretty clear, but aside from the form used or not used, the substance is that under Ohio law, as construed and applied by its taxing authorities and highest court, domestic insurance companies are not required to pay the personal property tax being imposed upon Appellant.

The "possibility," adverted to by the Ohio Court of Appeals, of any kind of "equalizing" personal property tax being included in one of the two alternatives for the computation of the franchise tax against a domestic corporation is completely negatived by the fact that the domestic insurance company pays that alternative only if it is less than the other alternative which by statute is always less than the franchise tax of a foreign insurance company on the same volume of business (Ohio Rev. Code, §§ 5725.18-19, 5729.02-03).

There is nothing in the principle of "reasonable classification" which would warrant putting the furniture and fixtures of a foreign insurance company in one category and the furniture and fixtures of a domestic insurance company in a different category for *ad valorem* tax purposes.

There is no reason or necessity to look at the taxing laws of Texas, the home state of Appellant, in order to determine the inequality of Appellant's treatment in Ohio, since there is nothing in the Ohio taxing statute in question which makes its operation against Appellant or non-operation against domestic companies contingent in any way on the laws of Texas.

And finally, there is no "legislating" difficulty about the kind of relief required in this case. All that is required is that the present Ohio personal property tax be declared unconstitutional as applied to Appellant.

ARGUMENT

I. OHIO'S PERSONAL PROPERTY TAX ON ONLY FOREIGN INSURANCE COMPANIES IS CLEARLY DISCRIMINATORY IN FAVOR OF DOMESTIC INSURANCE COMPANIES, AND THEREBY DENIES APPELLANT THE EQUAL PROTECTION OF ITS LAWS

This is an exceptionally clean-cut case, in that only one kind of tax is being contested, and there is no dispute about the facts with respect to it.

While the state's taxing structure here involved includes three kinds of taxes, franchise, real estate, and personal property, as applied to two kinds of insurance companies, foreign and domestic, this litigation tests only the constitutional validity of one tax, namely, Ohio's *ad valorem* tax on tangible personal property used in business (furniture and fixtures) of a foreign insurance company, which tax is not imposed on domestic insurance companies.

A. Application of the Taxing Statutes Involved

A brief review of the application of the pertinent taxing statutes to the two different kinds of corporations would seem to be in order.

Taking the simplest first, the real estate of a foreign insurance company is subject to exactly the same tax and rates as that of a domestic insurance company (Ohio Rev. Code, §§ 5709.01 and 5725.25, App. 1a, 12a).

Similarly, Ohio's taxing statutes make no distinction between foreign and domestic insurance companies, in the case of taxes on *intangible* personal property (Ohio Rev. Code, §§5709.02, 5709.03, App. 1a-2a, 2a-4a). Both are, in effect, exempt from such taxes, foreign insurance companies being excepted therefrom in section

5709.02 (App. 1a-2a), and domestic insurance companies being relieved by virtue of section 5725.25 (App. 12a).

On their face, Ohio's franchise taxes on foreign and domestic insurance companies are somewhat more complicated, but the resulting tax impact is comparatively simple: The franchise tax on the foreign insurance company is always at least 50% more than the franchise tax on the domestic insurance company.

This result grows out of a fixed rate of franchise tax on the foreign insurance company, and one of two alternative rates on the domestic insurance company, depending upon which produces the lesser tax. More specifically, the Appellant, as a foreign insurance company, pays a fixed franchise tax rate of 2.5 percent on its gross premiums from business in Ohio, less certain deductions (Ohio Rev. Code, §§ 5729.02-03, App. 12a-13a); while Appellant's domestic competitors pay the lower of two tax computations, either

(a) .2 percent of the company's reported capital and surplus, less certain specified liabilities; or

(b) .2 percent of its gross premiums (less the same deductions as in the case of foreign insurance companies) multipled by eight and one-third. (Ohio Rev. Code, §§ 5725.18-19, App. 11a-12a).

The second alternative for domestic companies and the sole method for foreign companies is based on gross premiums, less the same deductions, but different rates are prescribed. For the foreign insurance company, a rate of 2.5 percent is applied to gross premiums after deductions. For the domestic company, a rate of .2 percent is applied to eight and one-third times the gross premiums after deductions, which means a rate

of 8⅓ times .2 percent, or 1.67 percent. Since a rate of 2.5 percent is 50% more than a rate of 1.67 percent, the conclusion is inescapable that in all cases, the foreign insurance company will pay a franchise tax at least 50% higher than that paid by the domestic insurance company doing the same amount of business. This disparity would be even greater if the computation under the first of the alternatives for the domestic insurance company resulted in a lower tax computation, since the domestic company pays only the lower of the two alternatives.

As previously noted, the Supreme Court of Ohio did not issue an opinion. According to the opinion of the intermediate appellate court (R. 21), the specific rule of the Tax Commissioner (Rule No. 211, November 18, 1957) merely "restates" the personal property tax law as the statute (Ohio Rev. Code, § 5711.01) shows it to be, namely, that Appellant is a "taxpayer" and its property used in business is "taxable property" under this statute, whereas the same statute "excludes" domestic insurance companies. For present purposes of testing the "equal protection of the laws" validity of the resulting application of the taxing statute in question, it doesn't make any difference whether this statute was self-operative or became operative only after the exercise by the Tax Commissioner of certain delegated authority. In either event, with the approval of the highest court in the state, the Appellant foreign insurance company would be required to pay, while its domestic insurance competitors are not required to pay, an *ad valorem* tax on personal property used in business. As this Court has expressly held, "the state action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation

and its judicial interpretation." *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 570 (1949).

There is one other Ohio statutory provision which should be noted, namely, section 5725.25, which provides:

> ". . . but the tax provided for by sections 5725.01 to 5725.26, inclusive, of the Revised Code [relating to real estate and franchise taxes on domestic insurance companies] shall be *in lieu of all other taxes on the other property and assets of such domestic insurance company* and of all other taxes, charges, and excises on such domestic insurance companies, and of all other taxes on the stockholders, members, or policyholders of such company by reason of their stock or other interest in such insurance company, except as to annuities or the right to receive the proceeds of a policy payable after its maturity in installments, or left with the company at interest." (Emphasis added.)

From the opinion of the Court of Appeals of the First Appellate District of Ohio, it is not too clear whether the exclusion of the domestic insurance companies from the personal property tax in question is predicated primarily on the "excludes" portion of the "taxpayer" definition in section 5711.01, or on the "in lieu of all other taxes" language of section 5725.25. But here again, this is not important. The two provisions are consistent and the net result is all the same. Under Ohio law, as applied by its taxing authorities and approved by its highest court, the domestic insurance company pays (1) the same real estate taxes as the Appellant foreign insurance company, and (2) the same kind of franchise tax but always less than the Appellant foreign insurance company on the same volume of business, but (3) does not pay the personal

property tax which the Appellant is required to pay, or any other personal property tax.

B. Wheeling Steel Corporation v. Glander Is Controlling Here

It will be remembered that Appellant is not challenging the discriminatory franchise tax exacted from it by the State of Ohio on an annual basis. It might have been tempted to do so under the broad principles enunciated in the early authority of *Southern Railway Co.* v. *Greene,* 216 U.S. 400 (1910), involving a new franchise tax against a foreign railroad company having made great investments under a prior license for an indefinite period. In addition to the factual difference between that situation and this, the Appellant accepts the more modern line of authority recognizing that insofar as annual *franchise* taxes are concerned, the state is not required to admit a foreign corporation to carry on an intrastate business, and may license it upon terms it sees fit, apart from exacting surrender of rights derived from the United States Constitution. *Hanover Fire Insurance Co.* v. *Harding* (*Hanover Fire Insurance Co.* v. *Carr*), 272 U.S. 494 (1926); *Connecticut General Life Insurance Co.* v. *Johnson,* 303 U.S. 77 (1938).

However, a discriminatory *ad valorem* personal property tax against a duly licensed foreign corporation is truly "a horse of a different color." In this area, the leading Fourteenth Amendment case is *Wheeling Steel Corporation* v. *Glander, supra.* There, about fifteen years ago, this Court struck down, as violative of the equal protection clause of the Constitution, Ohio's *ad valorem* tax on accounts receivable of foreign, but not of domestic corporations. Speaking for

the Court,* Mr. Justice Jackson stated the controlling concept, at pages 571-572:

> "After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable *ad valorem* tax basis. Hanover F. Ins. Co. v. Harding (Hanover F. Ins. Co. v. Carr), 272 US 494, 510, 511, 71 L ed 372, 380, 381, 47 S Ct 179, 49 ALR 713; Power Mfg. Co. v. Saunders, 274 US 490, 493, 497, 71 L ed 1165, 1167, 1169, 47 S Ct 678."

The fundamental discrimination involved in the *Wheeling Steel* case was spelled out by the Court as follows at page 572:

> "If on the taxing date one of these petitioners and an Ohio competitor each owns an account receivable of the same amount from the same out-of-state customer for the same kind of commodity, both shipped from a manufacturing plant in Ohio and both sold out of Ohio by an agent having an office out of the State, appellant's account receivable would be subject to Ohio's *ad valorem* tax and the one held by the competing domestic corporation would not. *It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner.*" (Emphasis added.)

The only minor factual difference between that case and this lies in the intangible nature of the personal

* The only dissent, by Justices Douglas and Black, was on the ground that a corporation is not a "person" within the meaning of the Fourteenth Amendment.

property there being subjected to an *ad valorem* tax as against the tangible personal property here involved. On principle, the two cases are indistinguishable.

As recognized by the Court in *Wheeling Steel,* there was nothing new about the applicable principle. Over 20 years before, in *Hanover Fire Insurance Co.* v. *Harding* (*Hanover Fire Insurance Co.* v. *Carr*), 272 U.S. 494 (1926) this Court found it to be a denial of the equal protection of the laws for the State of Illinois to tax 100 percent of the net receipts of a foreign insurance corporation while at the same time not taxing the net receipts of domestic insurance companies and taxing the personal property of both at a valuation reduced to one-half of 60 percent of full value. Speaking for the full Court, Mr. Justice Taft said, at pages 510-11:

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment; *but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind.*" (Emphasis added.)

Timewise, in between *Hanover Fire* and *Wheeling Steel*, there was a sequel to *Hanover Fire*, from Illinois, which perhaps should be noted briefly if only to avoid some confusion which might otherwise result. The case referred to is *Concordia Fire Insurance Co.* v. *Illinois*, 292 U.S. 535 (1934). In that case, the Illinois tax on net receipts of a foreign insurance corporation for the years *1923-1926*, as reduced by the State Supreme Court, after proper scaling and debasement as in the case of personal property of domestic insurance companies, was upheld as against the claim that domestic insurance companies were not subjected to the same net receipts tax. On this feature the Court simply held that the foreign corporation taxpayer had not carried its burden of showing unlawful discrimination in that it had not shown the full tax situation of the domestic corporations. At page 548, the Court said:

> "For aught that appears it may be that taxes not applied to the foreign corporations are laid on the domestic corporations which are the substantial equivalent of the net receipts tax. For these reasons this claim of discrimination must fail."

Interestingly enough, in the same case, the Court found a denial of equal protection of the laws in the Illinois tax on net receipts of the foreign fire insurance company for the year *1927* on two grounds, (1) because it included receipts from casualty insurance, while casualty companies as such were not so taxed, and (2) because the tax for that year was laid on the full value of receipts without first debasing to 60% as was done with personal property of domestic fire insurance companies. *Concordia Fire Insurance Co.* v. *Illinois*, *supra*, at p. 550.

In the present case, there can be no doubt as to the full showing of the tax situation of the domestic insurance company, vis-a-vis the tax situation of the Appellant, and by the same token, there can be no doubt as to the resulting discrimination, or of the true basis for this discrimination. Appellant foreign insurance company is taxed on its tangible personal property used in business. Domestic insurance companies are not subjected to this or any other personal property tax. In its relation to the state for tax purposes, what possible distinction could there be, for example, between duplicate furniture and fixtures owned by a foreign insurance company and by a domestic insurance company? As with the same kind of accounts receivable in the *Wheeling Steel* case, the only possible difference obviously lies solely in the different residence of the owners.

II. THE DISCRIMINATORY TAX IN QUESTION CANNOT BE SUSTAINED ON ANY OF THE BASES OFFERED OR SUGGESTED BY APPELLEE OR THE OHIO COURTS

As previously noted, the Supreme Court of Ohio, without opinion, dismissed the appeal to it "for the reason that no substantial constitutional question exists herein" (R. 26).

We must look, therefore, to the opinion of the Court of Appeals for the First Appellate District of Ohio (R. 18-24), and to Appellee's statement opposing jurisdiction for grounds or reasons urged in support of the tax in question. Let us first consider the one argument which was made by Appellee in its opposing statement and which was also stressed in the Ohio Court of Appeals opinion (R. 21-22), namely, that the doctrine of *Wheeling Steel* does not apply here because there is no express statutory "exemption," in just that word, of domestic insurance companies from the personal property tax in question.

This argument is almost too strained to answer. While, as we shall see, literal exemption language is not required to accomplish non-liability for a tax, it is interesting to note that there was no express "exemption," in so many words, in the tax statutes involved in *Wheeling Steel.* Instead, there was some "shall not be subject" language and the exemption there referred to by the Court arose from a certification by the Tax Commissioner to the effect that the "reciprocal" provisions of the statute there involved (General Code of Ohio, §§ 5328-1 and 5328-2) had been *construed* and *applied* "so as to exempt" from taxation in Ohio accounts receivable of a domestic corporation arising from a sale by an agent having an office in another state, even though such goods be shipped from Ohio. *Wheeling Steel Corporation* v. *Glander, supra,* at p. 570. As there stated by the Court:

> "We deal with the taxing plan as an entirety as we find it in operation and pass only on the constitutionality of that which the State has asserted power and purpose to do."

More important than the absence of express exemption language is the inherent lack of merit in the claimed distinction. As this Court originally pointed out in *St. Louis Southwestern Railway Co.* v. *Arkansas,* 235 U.S. 350 (1914), at page 362:

> "We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

It is also interesting to note that, at one point in its opinion, the Court of Appeals did not hesitate to say:

> "The same section [5711.01] specifically excludes certain business from the definition of 'taxpayer.'

> Domestic insurance companies are excluded but are noted as 'otherwise taxed.'" (R. 20)

The only inaccuracy in this statement is that the note of "otherwise taxed" does not appear in section 5711.01. It appears, if at all, only in the form of the "in lieu of all other taxes" clause of section 5725.25 providing in effect that domestic insurance companies shall pay only real estate and franchise taxes. Here again, the real point is that it can make no possible difference whether the non-liability of the domestic insurance company for the personal property tax imposed on Appellant foreign insurance company arises from an express exemption, an implied exemption, an express exclusion in the specific taxing section, or from an "in lieu of all other taxes" provision of another taxing section. The result is all the same. As this Court graphically put it in a fairly recent case:

> "Equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." (*Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70 (1963).

The opinion of the Ohio Court of Appeals suggests a few other possible justifications for the tax in question, which will be treated in the order offered.

First, "in passing," the Ohio Court noted that the foreign corporation is not "subject to the possibility of a tax upon its entire capital and surplus as is a domestic corporation" (R. 21). This has reference, of course, to alternative (a) for determining the lesser of two franchise taxes to be imposed on domestic insurance companies. As we have seen, there is no room here for a "hidden" tax on personal property used in business by the domestic insurance company. It pays franchise tax alternative (a) only if it is less than franchise tax alternative (b), which is bound to be less

than the franchise tax on Appellant foreign insurance company. When the foreign insurance company and the domestic insurance company are both subject to the same tax on real estate, the same franchise tax (except that this tax is always at least 50% higher for the foreign than for the domestic company on the same amount of business), and only the foreign company is required to pay a tax on tangible personal property, it can hardly be claimed that either the real estate tax or the franchise tax includes any kind of "equalizing" personal property tax on the domestic company.

Next, after the express exemption argument already considered, the Ohio Court falls back upon the general power of the state to effect "reasonable tax classification" (R. 22-23). Appellant has no quarrel with that general principle, but how can it be applied here so as to put the furniture and fixtures of one life insurance company, a foreign corporation, in one class, and the furniture and fixtures of another life insurance company, a domestic corporation, in another class? On this point, what this Court said in *Southern Railway Co.* v. *Greene, supra,* at p. 417, is still good law:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

Next, it is mildly suggested by the Ohio Court (R. 22) that some kind of examination of the laws of Texas must be had in order to determine whether Ohio's personal property tax against Appellant, but not against

domestic insurance companies, is discriminatory against the former. However, the suggestion is not pursued by reference to any Texas statute; more importantly, there is, of course, no reciprocal type provision in the Ohio tax statute in question which makes its operation contingent in any way on the taxing statutes of Texas. The Ohio Court's reference (R. 22) to § 5729.06 of Ohio's Revised Code is completely beside the point. That retaliatory tax rate statute of Ohio relates only to *franchise* taxes and further insures the franchise tax advantage of domestic insurance companies over foreign insurance companies in Ohio. This statute provides, in effect, that if another state (Texas, for example) exacts a greater franchise charge from an Ohio insurance company than is provided for by Ohio statutes against a Texas insurance company, then the greater amount shall be charged against the Texas company in Ohio (App. 13a). This retaliatory Ohio franchise tax provision could not possibly affect in any way, much less equalize, the personal property tax required of foreign insurance companies, but not of domestic insurance companies, in Ohio. Even if Texas had (which it does not) a discriminatory *ad valorem* personal property tax which denied equal protection of its laws to foreign insurance companies, that would not lend any validity to Ohio's statute violating the same constitutional provision.

"Finally," the Ohio Court of Appeals found it "difficult to see how the complaining taxpayer could lawfully be granted the relief he seeks" (R. 23). The Court seemed to think that in order to grant effective relief, it would have to legislate by either writing in an exemption for foreign insurance companies which would favor them over other foreign corporations, or by writing in a personal property tax against domestic

insurance companies. The Ohio Court apparently misconceived Appellant's appeal. Appellant seeks no preferential treatment. On the contrary, Appellant seeks only equal *ad valorem* tax treatment with domestic insurance companies, and for that, no new legislation is required. All that is required is that the present Ohio personal property tax as now applied to foreign insurance companies, but not to domestic insurance companies, be declared unconstitutional. What, if anything, follows that in the way of personal property taxes against foreign and domestic insurance companies alike, would, of course, be up to the Ohio legislature in the first instance.

CONCLUSION

Based upon all the foregoing, it is submitted that there is no rational basis on which Ohio's *ad valorem* personal property tax against Appellant foreign insurance company, but not against domestic insurance companies, can be sustained. It is the clearest kind of denial of the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States, and should be so declared as applied to Appellant.

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APPENDIX

PERTINENT PROVISIONS OF REVISED CODE OF OHIO

§ 5709.01 Taxable property entered on general tax list and duplicate.

All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state, whether or not used in business, except unmanufactured tobacco which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United States government or any agency thereof, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state, and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code are subject to taxation. All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

§ 5709.02 Taxable property to be entered on classified tax list and duplicate.

All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, except as provided in this section or as otherwise provided or exempted in Title LVII [57] of the Revised Code; but the good will, license, or franchise of a business, whether granted by governmental authority or otherwise, shall not be considered property separate from the other property used in or growing out of such business. Property of the kinds mentioned in section 5709.03 of the Revised Code, used in and arising out of business trans-

acted in this state by or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5725.01 of the Revised Code, and nonwithdrawable shares of stock of financial institutions and dealers in intangibles located in this state and ownership interests of the depositors in incorporated financial institutions located in this state, the capital of which is not divided into shares, or which have no capital stock, as such ownership interests are defined in sections 5725.04 and 5725.07 of the Revised Code, shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by or on behalf of such persons, and nonwithdrawable shares of stock of financial institutions located outside of this state and ownership interests of the depositors in incorporated financial institutions located outside of this state, the capital of which is not divided into shares, or which have no capital stock, as such ownership interests are defined in sections 5725.04 and 5725.07 of the Revised Code, belonging to persons residing in this state, shall not be subject to taxation. Such property subject to taxation shall be entered on the classified tax list and duplicate of taxable property, or on the intangible property tax list in the office of the auditor of state and the duplicate thereof in the office of the treasurer of state.

A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock.

§ 5709.03 Fixing situs of certain classes of property within or without this state; application to be reciprocal; effect of provisions held invalid.

Property of the kind mentioned in this section, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner resides, under the circumstances following:

(A) Accounts receivable, resulting from the sale of property by an agent having an office in such other state

or from a stock of goods maintained therein, or from services performed by an officer, agent or employee connected with, sent from, or reporting to any officer or at any office located in such other state.

(B) Prepaid items, when the right acquired thereby relates exclusively to the business transacted in such other state or to property used in such business.

(C) In the case of accounts payable, the proportion of the entire amount of accounts receivable, whenever arising, represented by those arising out of business transacted in such other state ascertained as provided in this section shall be taken to represent the proportion of the entire amount of accounts payable arising out of the business transacted in such other state.

(D) Deposits, other than those used in business outside of such other state, when withdrawable in the course of such business by an officer or agent having an office in such other state; but deposits representing general reserves or balances of the owner thereof, maintained for the purpose of his entire business, wherever transacted, shall be considered located in the state in which the owner resides, if an individual, or in which its actual principal executive office is situated, if a partnership or association, or under whose laws it is organized, if a corporation, by whomsoever they may be withdrawable.

(E) Money kept on hand at an office or place of business in such other state.

(F) Investments not held in trust, when made, created or acquired in the course of repeated transactions of the same kind, conducted from an office of the owner in such other state, when either:

(1) such investments represent obligations of persons residing in such other state or secured by property located therein;

(2) an officer or agent of the owner at the owner's office in such other state, has authority, in the course of the owner's business, to receive or collect the income thereon, the principal, or both, when due, or to sell and dispose of the same.

This section shall be reciprocally applied, so that all property of the kinds mentioned in this section having a business situs in this state shall be taxed in this state and no such property belonging to a person residing in this state and having a business situs outside of this state shall be taxed. The assignment of a business situs outside of this state to property of a person residing in this state, in any case and under any circumstances mentioned in this section, is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section is held invalid as applied to property of a nonresident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof.

§ 5711.01 Definitions.

[See, in particular, paragraph (B).]

As used in sections 5711.01 to 5711.41, inclusive, of the Revised Code:

(A) "Taxable property" includes all the kinds of property, except real property, mentioned in sections 5709.01 and 5709.02 of the Revised Code, and also the amount or value as of the date of conversion of all taxable property converted into bonds or other securities not taxed on or after the first day of November in the year preceding the date of listing, and of all other taxable property converted into deposits after the date as of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent he may hold or control such bonds, securities, or deposits on such day,

without deduction for indebtedness created in the purchase of such bonds or securities from his credits; but taxable property does not include such investments and deposits as are taxable at the source as provided in sections 5725.01 to 5725.26, inclusive, of the Revised Code, nor surrender values under policies of insurance.

(B) "Taxpayer" means any owner of taxable property and includes every person residing in, or incorporated or organized by or under the laws of this state, or doing business in this state, or owning or having a beneficial interest in taxable personal property in this state and every fiduciary required by sections 5711.01 to 5711.41, inclusive, of the Revised Code to make a return for or on behalf of another. The tax commissioner may by regulations define and designate the taxpayer, as to any taxable property which would not otherwise be required by this section to be returned; and any such regulation shall be considered supplementary to the enumeration of kinds of taxpayers following:

(1) Individuals of full age and sound mind residing in this state;

(2) Partnerships, corporations, associations, and joint-stock companies, under whatever laws organized or existing, doing business or having taxable property in this state; and corporations incorporated by or organized under the laws of this state, wherever their actual business is conducted;

(3) Fiduciaries appointed by any court in this state or having title, possession, or custody of taxable personal property in this state or engaged in business in this state.

"Taxpayer" excludes all individuals, partnerships, corporations, associations, and joint-stock companies, their executors, administrators, and receivers who are defined in Title LVII of the Revised Code as financial institutions, dealers in intangibles, domestic insurance companies, or

public utilities, except to the extent they may be required by sections 5711.01 to 5711.41, inclusive, of the Revised Code, to make returns as fiduciaries.

(C) "Return" means the taxpayers' annual report of taxable property.

(D) "List" means the designation, in a return, of the description of taxable property, the valuation or amount thereof, the name of the owner, and the taxing district where assessable.

(E) "Taxing district" means, in the case of property assessable on the classified tax list and duplicate, a municipal corporation or the territory in a county outside the limits of all municipal corporations therein; in the case of property assessable on the general tax list and duplicate, a municipal corporation or township, or part thereof, in which the aggregate rate of taxation is uniform.

(F) "Assessor" includes the tax commissioner and the county auditor as deputy of the commissioner.

(G) "Fiduciary" includes executors, administrators, parents, guardians, receivers, assignees, official custodians, factors, bailees, lessees, agents, attorneys, and employees, but fiduciary does not include trustees unless the sense requires that it shall do so.

(H) "General tax list and duplicate" means the books or records containing the assessments of property subject to local tax levies.

(I) "Classified tax list and duplicate" means the books or records containing the assessments of property not subject to local tax levies.

(J) "Investment company" means any corporation, the shares of which are regularly offered for sale to the public, engaged solely in the business of investing and reinvesting funds in real property or investments, or the holding or the sale thereof for the purpose of realizing income or profit

which is distributed to its shareholders. Investment company does not include any dealer in intangibles, as defined in section 5725.01 of the Revised Code.

§ 5711.18 Valuation of accounts and personal property; procedure; income yield.

In the case of accounts receivable, the book value thereof less book reserves shall be listed and shall be taken as the true value thereof unless the assessor finds that such net book value is greater or less than the then true value of such accounts receivable in money. In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from net book value of accounts receivable or depreciated book value of personal property must be made in writing by the taxpayer at the time of making his return; and when such return is made to the county auditor who is required by sections 5711.01 to 5711.41, inclusive, of the Revised Code, to transmit it to the tax commissioner for assessment, the auditor shall, as deputy of the commissioner, investigate such claim and shall enter thereon, or attach thereto, in such form as the commissioner prescribes, his findings and recommendations with respect thereto; when such return is made to the commissioner, such claim for deduction from depreciated book value of personal property shall be referred to the auditor, as such deputy, of each county in which the property affected thereby is listed for investigation and report.

§ 5711.22 Listing and rates of personal property tax.

(A) Except as otherwise provided, personal property shall be listed and assessed at seventy per cent of its true value in money on the day that it is required to be listed or on the days or at the times that it is required to be estimated

on the average basis. Deposits not taxed at the source shall be listed and assessed at their amount in dollars on the day that they are required to be listed. Moneys shall be listed and assessed at the amount thereof in dollars on hand on the day that they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, except as otherwise provided in sections 5711.01 to 5711.36, inclusive, of the Revised Code, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either division (A) or division (B) of section 5701.06 of the Revised Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at their true value in money on the day that such investments are required to be listed.

Credits and other taxable intangibles shall be listed and assessed at their true value in money on the day as of which the same are required to be listed.

(B) Personal property of a merchant which is sold or held for sale for the use or consumption by the purchaser from the merchant, and not for resale, and which is required to be returned on the average basis as provided in section 5711.15 of the Revised Code, and personal property as defined in section 5701.03 of the Revised Code used in the business of preparing, serving, and selling food in the form of meals suitable for immediate consumption by the purchaser, shall be listed and assessed as follows:

(1) In the return filed for the year 1964, the first one hundred thousand dollars thereof at sixty-six per cent, and the amount thereof over one hundred thousand dollars at seventy per cent;

(2) In the return filed for the year 1965, the first one hundred thousand dollars thereof at sixty-two per cent, and the amount thereof over one hundred thousand dollars at seventy per cent;

(3) In the return filed for the year 1966, the first one hundred thousand dollars thereof at fifty-eight per cent, and the amount thereof over one hundred thousand dollars at seventy per cent;

(4) In the return filed for the year 1967, the first one hundred thousand dollars thereof at fifty-four per cent, and the amount thereof over one hundred thousand dollars at seventy per cent;

(5) In the returns filed for the years 1968, and thereafter the first one hundred thousand dollars thereof at fifty per cent, and the amount thereof over one hundred thousand dollars at seventy per cent;

(6) Where such property is located in more than one taxing district, the listing of the first one hundred thousand dollars thereof shall be apportioned to the various taxing districts wherein such property is located in the same ratio as the true value of such property in a taxing district bears to the total true value of such property wherever located in this state.

(C) Personal property, used in business, shall be listed and assessed at fifty per cent of its true value in money on the day that it is required to be listed or on the days or at the time that it is required to be estimated on the average basis as follows:

(1) All engines, machinery, tools, and implements of a manufacturer mentioned in section 5711.16 of the Revised Code, and all engines and machinery used or designed to be used in mining, and all tools and implements used or designed to be used for such purpose, excepting as provided in the last paragraph of this section, and all engines, machinery, tools, and implements used in stone plants and gravel plants, and all engines, machinery, tools, implements, and domestic animals used in agriculture, and all machinery, implements, and tools used in laundries, towel, and linen supply and dry cleaning plants, and all engines,

machinery, tools, implements, and other equipment used in radio and television broadcasting, except as any of the kinds of property mentioned in this division may have been legally regarded as improvements on land and considered in arriving at the value of real property assessed for taxation;

(a) The average value of all articles purchased, received or otherwise held by a manufacturer for the purpose of being used in manufacturing, combining, rectifying, or refining;

(b) The average value of all articles which were at any time manufactured or changed in any way by the taxpayer, either by combining or rectifying, or refining or adding thereto, but not including finished products unless kept or stored at the place of manufacture or at a warehouse in the same county therewith;

(c) Agricultural products on farms.

Boilers, machinery, equipment, and personal property used for the generation or distribution of electricity other than for the use of the person generating or distributing such electricity shall be listed and assessed at its true value in money on the day that it is required to be listed.

§ 5725.01 Definitions.

As used in sections 5725.01 to 5725.26, inclusive, of the Revised Code: . . .

(C) "Insurance company" includes every corporation, association, and society engaged in the business of insurance of any character, or engaged in the business of entering into contracts substantially amounting to insurance of any character, or of indemnifying or guaranteeing against loss or damage, or acting as surety on bonds or undertakings.

(D) "Domestic insurance company" includes every insurance company organized and existing under the laws of

this state, and every unincorporated association and society formed for the purpose of engaging in said business in this state, and excludes every foreign insurance company.

(E) "Foreign insurance company" includes every insurance company organized or existing under the laws of any other state, territory, country, or the United States.

§ 5725.18 Annual franchise tax on the privilege of being an insurance company.

An annual franchise tax on the privilege of being an insurance company is hereby levied, measured by the smaller of the following bases as applied to a domestic insurance company:

(A) The capital and surplus of a domestic insurance company having capital divided into shares, or the surplus of a domestic insurance company not having capital divided into shares, at the value thereof reported by the company in its annual statement for the preceding year filed with and approved by the superintendent of insurance setting forth the admitted and nonadmitted assets and the liabilities of the company, including in such liabilities:

(1) The reserve and unearned premium liabilities computed as provided by law, the same being the amount of debts of an insurance company because of its outstanding policies in gross;

(2) Amounts set apart for the payment of dividends to policyholders, and all actual liabilities set forth in the annual statement;

(B) Eight and one-third times the gross amount of premiums received by any such domestic insurance company from policies covering risks within this state during the preceding calendar year, after making the deductions prescribed by section 5729.03 of the Revised Code for foreign insurance companies. The objects of such tax are those declared in section 5725.24 of the Revised Code, to which only the same shall be applied.

§ 5725.19 Rate of franchise tax on domestic insurance companies.

In the month of June, annually, the auditor of state shall charge for collection from each domestic insurance company a franchise tax of two tenths of one per cent of the amount determined by the superintendent of insurance pursuant to section 5725.18 of the Revised Code and certified to the auditor of state. In no case shall such tax be less than twenty-five dollars.

§ 5725.25 Tax on real estate of domestic insurance company.

The real estate of a domestic insurance company shall be taxed in the place where it is located, the same as the real estate of other persons is taxed, but the tax provided for by sections 5725.01 to 5725.26, inclusive, of the Revised Code, shall be in lieu of all other taxes on the other property and assets of such domestic insurance company and of all other taxes, charges, and excises on such domestic insurance companies, and of all other taxes on the stockholders, members, or policyholders of such company by reason of their stock or other interest in such insurance company, except as to annuities or the right to receive the proceeds of a policy payable after its maturity in installments, or left with the company at interest. Sections 5725.01 to 5725.26, inclusive, of the Revised Code do not assess any tax on any foreign insurance company or affect any tax on a foreign insurance company under any laws of this state.

§ 5728.02 Annual statements of foreign insurance companies.

Every insurance company incorporated by the authority of another state or government shall set forth in its annual statement to the superintendent of insurance the gross amount of premiums received by it from policies covering risks within this state during the preceding calendar year, less return premiums paid for cancellations and considerations received for reinsurance of risks within this state, provided that dividends paid or otherwise allowed to pol-

icyholders shall not be deducted except as provided in section 5729.04 of the Revised Code. If the superintendent has reason to suspect the correctness of such statement he may make an examination at the expense of the state of the books of such company or its agents for the purpose of verifying them.

Where insurance against fire is included with insurance against other perils at an undivided premium, a reasonable allocation from such entire premium shall be made for the fire portion of the coverage in such manner as the superintendent of insurance may direct.

§ 5729.03 Computation and collection of tax.

If the superintendent of insurance finds the annual statement required by section 5729.02 of the Revised Code to be correct, he shall compute an amount of two and one-half per cent of the balance of such gross amount, after deducting such return premiums and considerations received for reinsurance, and charge such amount to such company as a tax upon the business done by it in this state for the period covered by such annual statement. All taxes collected pursuant to this section shall be credited to the general revenue fund.

§ 5729.06 Retaliatory tax rate.

If the laws of another state, territory, or nation authorize charges for the privilege of doing business therein or taxes against insurance companies organized in this state exceeding the charges provided in sections 5729.01 to 5729.15, inclusive, of the Revised Code, like amounts shall be charged against all insurance companies of such state, territory, or nation doing business in this state, instead of the charges provided by said sections.

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No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

On Appeal From the Supreme Court of Ohio and From the Court of Appeals, First Appellate District, State of Ohio

RESERVE LIFE INSURANCE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OF APPELLEE

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IN THE

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No. 96

On Appeal From the Supreme Court of Ohio and From the Court of Appeals, First Appellate District, State of Ohio

RESERVE LIFE INSURANCE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OF APPELLEE

QUESTION PRESENTED

The question presented by this case is as follows:

When an Ohio statute which imposes an *ad valorem* tax upon personal property used in business is applied to a foreign insurance company, is there a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States merely because the franchise tax upon domestic insurance companies is *in lieu* of all other taxes upon the property and assets of domestic insurance companies except for taxes upon real estate?

STATEMENT OF THE CASE

The summary of facts set forth by the appellant's Statement of the Case is substantially correct. However, one addition and one clarification appear to be in order.

The personal property upon which the *ad valorem* tax involved in this case was assessed, consists of furniture and equipment owned by the appellant and used in business by the appellant in various counties in the State of Ohio.

A foreign insurance company would, under the Ohio law, be subject to exactly the same real estate tax *rates* as a domestic insurance company, provided each owned real estate located in Ohio and in the same taxing district, or in taxing districts with identical tax rates. The facts in this case are stipulated, and there is no stipulated fact, evidence or testimony of record which indicates that the appellant herein owned, or owns, any real estate in the State of Ohio.

SUMMARY OF ARGUMENT

In Ohio's taxing structure the taxation of the franchise of a domestic insurance company and the personal property of such a company is interrelated, with the franchise tax being set at such a rate that the legislature determined that it should be *in lieu* of an *ad valorem* tax upon personal property used in business by such a company. The franchise tax levied upon foreign insurance companies is not *in lieu* of an *ad valorem* tax upon the personal property used by them in business in Ohio. The effect of the tax structure, in its entirety, is in favor of domestic companies but entirely within the bounds of preference permitted by the Fourteenth Amendment for the purpose of serving the public interest. The basis upon which it is conceived is clearly rational. The appellant's challenge runs primarily to the mode or manner employed by Ohio in arriving at this entirely reasonable and proper result.

Where two or more proper modes of arriving at an entirely permissible result are available, the one employed by a state cannot be declared unconstitutional merely because the taxpayer affected would have preferred that a different mode be employed.

In exercising the right of engaging in the insurance business in Ohio, the appellant is not a person within the scope of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

I—When Viewed in Its Entirety the Challenged Statute Is Constitutional

The appellant admits at the outset of its brief that only the constitutional validity of one tax, namely, Ohio's *ad valorem* tax on tangible personal property used in business, is involved in this case. However, the appellant immediately launches into a discussion of the Ohio franchise tax law applicable to domestic and foreign insurance companies. It is thus apparent that appellant's challenge of Ohio's *ad valorem* tax is not based upon alleged discrimination between the treatment of the personal property used by the appellant in its business, in Ohio, and the personal property used by persons resident of Ohio in their businesses generally. Rather, appellant's challenge is based upon an alleged discrimination in the treatment of that personal property used in business by the appellant, a foreign insurance company, as compared with personal property of a domestic insurance company. Further, it is contended that the alleged discriminatory treatment results because Chapter 5729, Ohio Revised Code, which levies a franchise tax measured by the business done by a foreign insurance company in Ohio at the rate of two and one-half per cent of the gross premiums received less returned premiums and consideration received for reinsurance, does not contain an *in lieu of* proviso such as appears in Section 5725.25, Ohio Revised Code. Section 5725.18, Ohio Revised Code, levies an annual franchise tax upon domestic insurance companies upon the privilege of being an insurance company computed by either of two options, one of which results in an effective rate of 1.67% upon gross premiums less deductions of the same type allowed foreign insurance companies.

Section 5725.25, *supra*, provides with respect thereto, in part:

> "The real estate of a domestic insurance company shall be taxed in the place where it is located, the same as the real estate of other persons is taxed, but the tax provided for by sections 5725.01 to 5725.26, inclusive, of the Revised Code, *shall be in lieu of* all other taxes on the other property and assets of such domestic insurance company * * *" (Emphasis added.)

It has been recognized that foreign corporations cannot do business within a state except by the consent of the state —a state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. *Hanover Fire Insurance Company v. Harding (Hanover Fire Insurance Company v. Carr)*, 272 U.S., 494, 71 L.Ed., 372, 47 S.Ct., 179.

It is also well settled that:

> "A state may impose a rate of taxation upon a foreign corporation for the privilege of doing business within the state which differs from the rate that it applies to its own corporations upon the franchises which the state grants in creating them." *Cheney Bros. Co. v. Massachusetts*, 246 U.S., 147, 62 L.Ed., 632, 38 S.Ct., 295.

As was stated by the court in *Baltic Mining Co. v. Massachusetts*, 231 U.S., 68, 58 L.Ed., 127, 34 S.Ct., 15:

> "* * * Even if, as plaintiffs in error contend, under the statute, domestic corporations are favored, the statute is not invalid, for no limitation upon the power of a state to exclude foreign corporations requires identical taxes in all cases upon domestic and foreign corporations."

Also relative to this point is *Carmichael v. Southern Coal & Coke Co.*, 301 U.S., 495, 81 L.Ed., 1245, 57 S.Ct., 868:

> "Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation, and inequalities which result from the singling out of one

particular class for taxation or exemption infringe no constitutional limitation.

"The legislature is not bound to tax every member of a class or none, but may make distinctions of degree having a rational basis."

The appellee is not unaware of the qualification of the foregoing, as stated in the *Hanover* case, *supra*:

"* * * there is a very important qualification to this power of the state, * * * That qualification is that a state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. * * *"

However, this statement may be more readily understood by reference again to the *Carmichael* case, *supra*, in which it was said:

"Where the public interest is served, one business may be left untaxed and another taxed in order to promote the one, or to restrict or suppress the other."

See also *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S., 522, 3 L.Ed. 2d, 480, 79 S.Ct., 437, wherein it was held:

"A statute which encourages the location within the state of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the equal protection clause of the Fourteenth Amendment."

The significance of all the foregoing is that Ohio's franchise tax, as applied to both foreign and domestic insurance companies, is constitutional. Even the appellant recognizes this at page 12 of its brief when it states that it "is not challenging the discriminatory franchise tax exacted from it by the State of Ohio." In fact, the appellant "accepts the more modern line of authority" as outlined in the cases cited *supra*.

But then the appellant, although it "is not challenging" Ohio's franchise tax, immediately challenges Ohio's *ad valorem* tax and uses as a basis of its attack a provision of the Ohio franchise tax law.

It is submitted that in order to evaluate the appellant's challenge the substance of these laws must be viewed in their entirety. As stated in *Wheeling Steel Corporation v. Glander*, 337 U.S., 562, 93 L.Ed., 1544, 69 S.Ct., 1291:

> "In testing the validity of a state tax statute, the Supreme Court of the United States deals with it as an entirety as it is found in operation, and passes only on the constitutionality of that which the state has asserted power and purpose to do."

The word "lieu" is defined by Black's Law Dictionary, Fourth Edition, as follows:

> "LIEU. Fr. Place; room. It is only used with 'in;' *in lieu*, instead of. Enc. Lond."

Said authority also contains the following definition:

> "LIEU TAX. A lieu tax means instead of or a substitute for, and it is not an additional tax. Lebeck v. State, 62 Ariz. 171, 156 P. 2d 720, 721."

Webster's Third New International Dictionary defines "lieu" to mean "instead" and "in lieu of" to mean "in place of: instead of," after which appears the following example: "rendered three days' work in lieu of rent."

It is therefore perfectly clear that in its entirety the Ohio law does not "exempt" domestic insurance companies from *ad valorem* taxation of their personal property, rather their personal property is taxed in a substitute manner, *via* the imposition of a franchise tax. In the case of *Cincinnati Air Taxi, Inc. v. Bowers*, 173 Ohio St., 99, 180 N.E. 2d, 17 (1962), the phrase "in lieu of all other taxes" was before the court and with respect thereto the Supreme Court of Ohio said:

> "By Section 4561.18, Revised Code, aircraft owners are placed in a special and preferred class, and full compliance with that statute is a prerequisite to escaping the general property tax. Of course, the license taxes imposed by that section 'are *in lieu of all other taxes* on or with respect to ownership of such aircraft,' but the provision last quoted applies only where the aircraft is licensed pursuant to an application and the taxes are paid in conformity with the terms of the statute. * * *" (Emphasis added.)

So we have in reality only a substitution of a tax, which, insofar as it applies to insurance companies, is a more or less universal practice. As stated in 14 Fletcher Cyclopedia Corporations, Section 7030, at page 1031:

> "Insurance companies may be taxed either on their property or on their business, or both, i.e., a property tax may be imposed or an excise tax or both. In most states the property tax has been discarded either wholly or in part, and an excise tax substituted therefor wholly or in part, measured either by capital or capital stock, the capital with the addition of any accumulated surplus, net valuation of policies held in the state, gross earnings or receipts, net income, or by the gross or net premiums received."

Appellant's contention is, therefore, reduced to its true nature; i.e., an assertion that although a variance of rate is permissible, as between domestic and foreign insurance companies, when taxing the privilege granted to the foreign insurance companies such variance becomes impermissible if the substitution of one tax for another occurs.

In *Allied Stores of Ohio, Inc. v. Bowers, supra,* it was determined that:

> "A classification, though discriminatory, is not arbitrary nor violative of the equal protection clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it."

See also, *State Board of Tax Commissioners of Indiana v. Jackson,* 283 U.S., 527, 75 L.Ed., 1248, 51 S.Ct., 540, and *Carmichael v. Southern Coal & Coke Co., supra.*

It is certainly not unreasonable to conceive that the Ohio legislature intended, by its substitution of the franchise tax for the personal property tax with respect to domestic insurance companies, which is no more than "a difference in the modes of taxation" which was approved in *Concordia Fire Insurance Co. v. State of Illinois,* 292 U.S., 535, 78 L.Ed., 1411, 54 S.Ct., 830, to encourage the location of insurance companies in Ohio. In the *Concordia* case, *supra,* it was determined:

> "Unconstitutional discrimination in taxation does not exist where, though there is a difference in the modes of taxation, there is substantial equality in the resulting burden, even though there is not mathematical equivalence."

Certainly, it is not unreasonable to conceive that the legislature was cognizant of the fact that all or a large part of the premiums collected by a foreign insurance company may be withdrawn from the state, whereas the same would not ordinarily be expected with domestics. Further, all or a large part of the real estate of a domestic insurance company may reasonably be expected to be in Ohio, whereas the real estate of a foreign insurance company may reasonably be expected to be elsewhere.

The appellant has failed to show, of record, any real discrimination. The burden of establishing the unconstitutionality of a statute rests upon him who assails it. *Metropolitan Casualty Ins. Co. v. Brownell,* 294 U.S., 580, 79 L.Ed., 1070, 55 S.Ct., 538.

The aggregate effect of Ohio's laws may be to tax foreign insurance companies at a rate a fraction of a per cent higher than those upon domestic insurance companies. But

the appellant has not shown this to be unreasonably to its disadvantage. Mathematical equality is neither required nor obtainable. *Concordia Fire Insurance Co. v. Illinois, supra.*

It should be noted that the furniture and equipment here taxed are not of the type of property involved in *Southern Railway Co. v. Greene*, 216 U.S., 400, 54 L.Ed., 536, 30 S.Ct., 287; the appellant herein is not a captive of the State of Ohio, and its property is not of such peculiar nature as was involved in the *Greene* case, *supra.* Cf. *Cheney Bros. Co. v. Massachusetts, supra.*

II — Appellant Is Without Status To Make This Challenge

In *State ex rel. v. Ackerman*, 51 Ohio St., 163, 37 N. E., 828, it was held:

> "1. Foreign insurance companies and associations, whether incorporated, or not, before commencing business in this state, are required to obtain a certificate of authority to do so, from the Superintendent of Insurance."

In said case, it was held that *quo warranto* would lie against an unincorporated association because its acts "are done after the manner of corporations" and such an association "may be ousted from transacting the business of insurance within this state." The basis of the holding was that right and privilege of carrying on an insurance business is an authority which emanates from the state, and the privilege granted is a franchise.

In *Robbins v. Hennessey*, 86 Ohio St., 181, 99 N. E., 319, it was stated:

> "* * * The statutes of the state now require compliance with certain conditions designed for the security and protection of the public, and, therefore, the right to transact this business is no longer a private right, but a franchise. * * *"

And in *Renschler v. State, ex rel. Hogan*, 90 Ohio St., 363, 107 N. E., 758, *quo warranto* was allowed and a decree of ouster affirmed against an individual with the observation that:

> "It may well be questioned whether a franchise of this character, which by its very nature presupposes perpetuity, could be granted to an individual. * * *"

Section 3907.01, Ohio Revised Code, provides:

> "Any number of persons, not less than thirteen, may associate and form a company to make insurance upon the lives of individuals, and every type of insurance appertaining thereto or connected therewith, on the mutual or stock plan, and to grant, purchase, or dispose of annuities."

Section 3907.02, Ohio Revised Code, provides, in part:

> "The persons forming a company under section 3907.01 of the Revised Code *shall file* in the office of the secretary of state *articles of incorporation* * * *" (Emphasis added.)

It is thus apparent that only corporations or organizations equivalent to corporations may obtain a franchise to engage in the life insurance business in Ohio.

This raises, in modified form, the question presented in the dissenting opinion of Justices Douglas and Black, in *Wheeling Steel Corporation v. Glander, supra.*

The question there raised was whether a corporation may be a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. The instant question is more limited, to wit: Is a corporation a "person" within the Equal Protection Clause of the Fourteenth Amendment, when it is exercising a right which natural persons do not possess?

It is well established that corporations are not citizens within the Privilege and Immunity Clause of the Four-

teenth Amendment.) However, the court has historically had difficulty with the status of corporations under the Equal Protection Clause. The early cases involved questions of jurisdiction, the rights to sue or be sued, and matters of contract. It was initially held that the rights of a corporation depended upon the citizenship of its members. Later, for purposes of jurisdiction, it was presumed that the members of the corporation were citizens of the state of incorporation. This history is set out in *Paul v. Virginia*, 75 U.S., 168, 19 L.ed., 357, 8 Wall., 168.

Then, suddenly, came the announcement in *Santa Clara County v. Southern Pacific R.R. Co.*, 118 U.S., 394, 30 L.ed., 118, 6 S.Ct., 1132 (1886):

> "Announcement by Mr. Chief Justice Waite:
> "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these Corporations. We are all of opinion that it does."

Thus, without argument a decision of great importance was made, a decision which, according to some historians, implied that something was hidden in the Fourteenth Amendment of which the ratifiers and all but a few of the drafters were totally unaware. See The Conspiracy Theory, 47 Yale Law Journal, 371.

Then followed a series of opinions by Justice Fields. At first, the "soundness" of the "position, that corporations are persons within the meaning of the clause in question" was "admitted" by the court upon the authority of the *Santa Clara County* case, *supra*. See *Minneapolis and St. Louis R. Co. v. Beckwith*, 129 U.S., 26, 32 L.ed., 585, 9 S.Ct., 207.

Next—it was said that "'Private corporations are persons within the meaning of the amendment; it has been so

held in several cases by this court * * *'' and the court was again relying primarily upon the *Santa Clara County* case, *supra*. See *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U.S., 386, 35 L.ed., 1051, 12 S.Ct., 255.

Finally, it was stated by Justice Brewer in 1897:

> "It is well settled that corporations are persons within the provisions of the 14th Amendment of the Constitution of the United States. * * *''

And in making this statement, principal reliance was again upon the *Santa Clara* case, *supra*. See *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U.S., 150, 41 L.ed., 666, 17 S.Ct., 255.

Thus, in the space of eleven years, a proposition announced, without argument, became "well settled," and all by reliance upon the original, unargued case. So the present position is that corporations are not citizens but are persons. When this is applied to foreign corporations admitted to do business in a state other than that in which originally created, it results in a most peculiar concept. In brief, a state is not required to admit a foreign corporation at all, but if it does, it must thereafter extend "equal protection," unless it has conditioned the admission (see *Lincoln National Life Ins. Co. v. Read*, 325 U.S., 673, 89 L.ed., 1861, 65 S.Ct., 1220), in which event it may not discriminate against the admitted corporation for the initial period for which admitted but may thereafter refuse altogether to allow continuance of business in the state.

This position is self contradictory. It denies a state a right to discriminate unless as a condition to admission it reserves the right to the ultimate discrimination, i.e., complete and arbitrary refusal of continued admittance or, in reality, expulsion. Furthermore, the general position itself is sometimes found to be so unrealistic as to contribute to gross injustice and is therefore ignored. See *Venice Hunting & Trapping Co. v. Salinovich*, 10 F.2d, 222.

It is submitted that the time has come to recognize certain fundamental facts, dictated by basic logic:

First, the word "persons" was used in the Equal Protection Clause of the Fourteenth Amendment because it was recognized that there were many people in this country who were neither native born nor naturalized.

Second, a corporation is not a person, except to the extent that it is made so by the state which creates it, or, in the case of foreign corporations, to the extent made so by a state which admits it to do business within its jurisdiction.

Third, in creating or admitting a corporation, a state may, for special purposes, endow it with rights superior to those of individual citizens.

Fourth, to the extent that a corporation may be created or admitted into a state to exercise those rights which citizens may exercise, it may be made a person and in that capacity entitled to equal protection. However, to the extent that a corporation may be created or admitted to exercise rights superior to those which a citizen may exercise, it is in fact superior to a "person" and when claiming to exercise rights peculiar to that capacity it is not a "person" within the scope of the Fourteenth Amendment to the Constitution.

CONCLUSION

The Ohio taxing system as applied to the appellant does not, when viewed in its entirety, violate the Fourteenth Amendment to the Constitution of the United States. Ohio does not exempt domestic insurance companies from *ad valorem* taxes while taxing foreign insurance companies. Ohio does substitute within its franchise tax structure so that the franchise tax paid by domesties is *in lieu* of an *ad valorem* tax on their personal property. However, when viewed in its entirety, the aggregate result is not an unreasonable discrimination against the appellant herein. Appellant's objection runs primarily to the mode employed by Ohio in making this distinction, a distinction which Ohio has a constitutional right to make. It is respectfully submitted that when viewed as an entirety both the system of taxation and the results thereof, in Ohio, are within the scope of constitutional action under the Fourteenth Amendment, as defined by decisions of this court. Such being the case, the appellant herein cannot prevail. It may have preferred to see Ohio employ a different mode or manner to arrive at the same result, but this is not a basis for declaring a statute unconstitutional. Finally, the appellant is engaged in a business which is peculiar to corporations, a business which individual persons cannot pursue in Ohio. Appellant in this instance is, therefore, not a person within the scope of the Equal Protection Clause of the Fourteenth Amendment to the Constitution. Consequently, the decision appealed from should be affirmed.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
FEB 19 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 96

RESERVE LIFE INSURANCE COMPANY, *Appellant,*

v.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO, *Appellee.*

On Appeal from the Supreme Court of Ohio and from the Court of Appeals, First Appellate District, State of Ohio

REPLY BRIEF OF THE APPELLANT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No. 96

RESERVE LIFE INSURANCE COMPANY, *Appellant,*

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On Appeal from the Supreme Court of Ohio and from the Court of Appeals, First Appellate District, State of Ohio

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REPLY BRIEF OF THE APPELLANT

LIMITED SCOPE

This brief is limited to two rather surprising arguments of the Appellee which could hardly have been anticipated.

The first is more of a new twist on the "in lieu of all other taxes" language of section 5725.25 of the Revised Code of Ohio (Appellant's Brief, App. 12a).

Appellee now says in effect that the admitted discrimination involved in Ohio's *ad valorem* tax on the furniture and fixtures of a foreign insurance company, but not of a domestic insurance company, is beyond the protection of the Fourteenth Amendment because the same amount of tax discrimination or possibly more might have been accomplished, without violating this amendment, simply by means of an even more discriminatory franchise tax on such foreign insurance company.

The second argument is an eleventh-hour attempt to raise for the first time in this case, the very old question of whether a corporation has any right under the equal protection of the laws clause of the Fourteenth Amendment, a proposition long since well settled against Appellee's position.

Neither argument would seem to merit very lengthy discussion.

I. OHIO'S PERSONAL PROPERTY TAX AGAINST APPELLANT FOREIGN INSURANCE COMPANY MUST BE TESTED AS IT IS NOW WRITTEN, AND NOT AS IT MIGHT BE REWRITTEN INTO A MORE DISCRIMINATORY FRANCHISE TAX

The Appellee's net argument in support of the taxing measure here involved, reduced to its simplest terms, is as follows: Since it is conceded that a state may discriminate against foreign corporations in exchange for extending the privilege to them of doing business within the state, then such discrimination against foreign corporations and in favor of domestic corporations may properly pervade all or any part of the entire taxing structure of the state. In other words, Appellee says that the same amount of tax money *might* have been extracted from Appellant in the form of a *more*

discriminatory *franchise* tax (if the legislature had seen fit to do so), and that, therefore, Appellant foreign insurance company has no right to complain of the *ad valorem* personal property tax imposed upon it but not upon domestic insurance companies. If this line of thinking should be followed to its logical conclusion, a state could discriminate against a foreign company in any form of tax, fee or charge which it collects, for example, gasoline taxes, sales taxes or taxes on real property. This is indeed a novel theory, not only without judicial precedent, but directly contrary thereto. *Wheeling Steel Corp.* v. *Glander,* 337 U.S. 562 (1949). As noted in that case, and as discussed at length in our original brief, the courts have always recognized the dividing line between franchise or privilege taxes on the one hand and *ad valorem* taxes on the other hand. The personal property tax here involved clearly falls within the latter class, where arbitrary classification and resulting discrimination are prohibited.

To speculate, as the Appellee does, as to what the state of Ohio "might" have done in establishing its tax structure is entirely irrelevant. This Court must pass upon the constitutionality of these taxing statutes as they are, both franchise and *ad valorem,* and not as they might have been drawn.

The extended discussion in our original brief of the franchise and real property tax statutes of Ohio was not advanced as a test of the validity of either, but rather to show clearly that in neither is there any room for a "hidden" or "equalizing" tax upon domestic insurance companies in Ohio which would justify their exclusion from the personal property taxing measure. By thus demonstrating that domestic

insurance companies clearly do not pay any taxes to which foreign insurance companies are not subject to the same or greater extent, the Appellee's "in lieu of" argument becomes nothing but words. With this showing of the complete picture of Ohio's tax laws, the Appellant avoids the pitfall to which the taxpayer in *Concordia Fire Insurance Co.* v. *Illinois,* 292 U.S. 535 (1934) fell prey. There, this Court stated (292 U.S. at 548):

> "For aught that appears it may be that taxes not applied to the foreign corporations are laid on the domestic corporations which are the substantial equivalent of the net receipts tax."

No such assertion can be made here.

The Appellee fails to direct this Court's attention to any cases which would support its position, preferring instead to extract a series of terse quotes from inapposite decisions. For example, the cases of *Cheney Bros. Co.* v. *Massachusetts,*[1] 246 U.S. 147 (1918), and *Baltic Mining Co.* v. *Massachusetts,* 231 U.S. 68 (1913), were purely franchise tax decisions. The case of *Cincinnati Air Taxi, Inc.* v. *Bowers,* 180 N.E. 2d 17 (1962), concerned a personal property tax on unlicensed aircraft owned by Ohio residents, and did not involve resident versus nonresident discrimination. The *Carmichael* v. *Southern Coal and Coke Co.* case, 301 U.S.

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[1] The *Cheney Bros.* case actually involved seven foreign corporations, six of which challenged the imposition of the excise tax under the commerce clause, alleging that they were not engaged in local business within Massachusetts. Only one of the plaintiffs there, White Company, which had conceded that it was engaged in a local business in Massachusetts, raised the equal protection argument.

495 (1937), tested the constitutionality of the Alabama Unemployment Compensation Act, which did not discriminate between domestic and foreign corporations. *Metropolitan Casualty Ins. Co.* v. *Brownell,* 249 U.S. 580 (1935), involved an Indiana statute regulating the clauses which foreign insurance companies could insert in their policies. No tax measure was there involved. The Appellee does not even attempt to distinguish the *Wheeling Steel* and *Hanover Fire* cases, probably for the obvious reason that they are directly in point on the necessary demarcation between franchise and *ad valorem* taxes.

This Court, in *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1959), upheld an Ohio statute which imposed a tax on the merchandise of Ohio residents held in storage warehouses, while excluding from the tax similar merchandise of nonresidents. A majority of the Court found the statutory classification not arbitrary and, accordingly, not violative of the equal protection clause. Mr. Justice Brennan wrote a separate opinion, concurred in by Mr. Justice Harlan, expressing the view that a classification which discriminates *against* a state's residents and in favor of nonresidents "clearly presents no state action disruptive of the federal pattern" (358 U.S. at 533). In both opinions, this Court recognized the continuing validity of the *Wheeling Steel* holding that arbitrary classification and its resulting discrimination against a foreign corporation in the *ad valorem* tax field is violative of the equal protection clause. It is submitted that the instant case presents the clearest example of just such a prohibited classification.

II. THAT A CORPORATION IS ENTITLED TO THE BENEFITS OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT OPEN TO QUESTION AT THIS LATE DATE

The Appellee has raised an additional point not heretofore urged in any of the lower court proceedings, or in prior opposition to the noting of jurisdiction by this Court. Appellee points out that under Ohio law a domestic insurance company must be either a corporation or an association of not less than thirteen persons. (Ohio Rev. Code §§ 3907.01-02). Appellant is, of course, a corporation. Whether Appellant could conduct an insurance business in Ohio as a different type of entity is beside the point and adds nothing to Appellee's position.[2] Stripped of surplusage, appellee's argument is, that being a corporation, Appellant does not come within the scope of the equal protection clause of the Fourteenth Amendment to the Constitution. While this argument is new to the instant case, it is very old in the field of constitutional law. Between 1886 and 1889, this Court decided four cases which established the principle that corporations are persons within the meaning of the Fourteenth Amendment and may envoke the benefits of the equal protection clause. *Santa Clara County* v. *Southern Pacific R.R. Co.*, 118 U.S. 394 (1886); *Pembina Con. Silver Mining Co.* v. *Pennsylvania*, 125 U.S. 181 (1888); *Missouri Pacific R. Co.* v. *Mackey*, 127 U.S. 205 (1888); *Minneapolis R. Co.* v. *Beckwith*, 129 U.S. 26 (1889).

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[2] In the interests of completeness, perhaps it should also be noted that under certain circumstances foreign unincorporated companies, partnerships and associations, as well as corporations, may qualify to engage in the insurance business in Ohio if they meet the other requirements (Ohio Rev. Code, §§ 3909.09-17).

In the footnote below,[3] we have cited a few of the leading decisions of this Court subsequent to 1889 which have specifically recognized and reiterated this doctrine. In at least 267 other cases, by actual count, this Court reached the *merits* of a contention by *a corporation* that a particular state statute denied it the equal protection of the law guaranteed by the Fourteenth Amendment. As recently as June 22, 1964, in *Bell* v. *Maryland*, 378 U.S. 226, 262, Mr. Justice Douglas in Appendix I to his opinion, recognized that corporations are entitled to the equal protection of the laws and stated: "While that view is the law today, it prevailed only over dissenting opinions."

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[3] *Home Insurance Co. of New York* v. *New York*, 134 U.S. 594 (1890);
Charlotte, C. & A.R. Co. v. *Gibbes*, 142 U.S. 386 (1892);
Covington & L. Turnpike Road Co. v. *Sandford*, 164 U.S. 578 (1896);
Gulf, C. & S.F.R. Co. v. *Ellis*, 165 U.S. 150 (1897);
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Frost v. *Corporation Commission*, 278 U.S. 515 (1929);
Louis K. Liggett Co. v. *Lee*, 288 U.S. 517 (1933);
Concordia Fire Insurance Co. v. *Illinois*, 292 U.S. 535 (1934);
Wheeling Steel Corporation v. *Glander*, 337 U.S. 562 (1949).

We cannot believe that this Court would want any further reargument of this established principle.

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